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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF WISCONSIN,

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.

FREDERIC K. CONOVER,
OFFICIAL REPORTER.

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JUDGES OF THE SUPREME COURT

OF THE

STATE OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

ORSAMUS COLE,	CHIEF JUSTICE.
WILLIAM P. LYON,	ASSOCIATE JUSTICES.
DAVID TAYLOR,	
HARLOW S. ORTON,	
JOHN B. CASSODAY,	

Attorney General, CHARLES E. ESTABROOK.

Clerk, - - - CLARENCE KELLOGG.

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SUPREME COURT RULE.

Adopted Dec. 13, 1887, to take effect Jan. 2, 1888.

In all criminal cases the plaintiff in error shall prepare and serve upon the Attorney General, at least ten days before the case is called for argument, a printed or written statement of the points of error relied upon.

MEMORANDUM.

Mr. Justice LYON took no part in the decision of any of the cases reported in this volume in which the opinions were filed subsequent to April 1, 1887.

This volume contains all cases finally disposed of prior to June 1, 1887, and not previously reported. Its appearance has been delayed by the ill-health of the reporter. It is expected that volume 69 (containing cases from June to November, 1887) will be issued in a comparatively short time, and will soon be followed by volume 70.

The case of *Poposkey v. Munkwitz* (page 322) was prepared for publication by James Simmons, Esquire, of the Walworth county bar, and the cases decided April 12, 1887, with the exception of *Peitz v. The State*, were also in large measure prepared by him. A. L. Sanborn and Chas. N. Brown, Esquires, of the Dane county bar, have also each assisted in the preparation of a few of the cases reported herein.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 67.

Page xxv, and p. 195, line 4. Read Ladd v. Anderson, 58 W. 591.

Page xxviii. Read Scheiber v. Kaehler, 49 W. 291....434.

Page xxviii, and p. 627, line—4. Read State v. Farmer, 49 W. 459.

Page xxix. Read Steffen v. C. & N. W. R. Co. 46 W. 259, and Stephenson v. Wilson, 50 W. 95.

Page 730. Under SESSION LAWS read: 1871, P. & L. ch. 45, and 1871, P. & L. ch. 45, sec. 10.

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TABLE

OF THE

NAMES OF CASES

REPORTED IN THIS VOLUME.

Arpin v. Burch *619*

(1) Logs and timber: Cutting by mistake: Confusion: Retaking by owner. (2) Conversion: Interest. (3) Limitation of actions: Laches. (4) Parties: Assignment of cause of action.

Atkinson v. Harran *405*

Assault and battery: Pleading: Justification: Special damages.

Atlas Paper Company, Kerkhof v *674*

Aultman & Co. v. Case *612*

Austin v. Moe *458*

Instructions to jury: Duty of court and of counsel: Contracts: Board furnished to mother-in-law.

Baker, Garnishee, etc., First National Bank of Dubuque v *442*

Baker, Garnishee, etc., Peterson v *451*

Bartlett, Fuller & Johnson Manufacturing Company (Limited) v *73*

Baum and others v. Bosworth and others, Garnishees, etc. *196*

(1) Debtor and creditor: Fraudulent conveyance: Chattel mortgage. (2) Evidence of value: Reversal of judgment.

Blake v. Blake *303*

Divorce: Alimony or partition of estate?

Board of Supervisors and Town Clerk of the Town of Leon, The State ex rel. Smith v *502*

Digitized by Google

Bonneville v. The Western Assurance Company *298*

INSURANCE AGAINST FIRE. (1) Additional insurance without consent: Forfeiture: Waiver. (2) Assured bound to know contents of policy.

Bosshard, Willard v *454*
Bosworth and others, Garnishees, etc., Baum and others v. *196*
Breitenfield, Voelz v *491*
Breslauer v. Meissner, Intervener *336*
Brickley and another v. Walker *563*

(1, 2) Appeal to S. C.: Instructions to jury. (3, 13–15) Conversion: Chattel mortgages: Pleading. (4–11) Debtor and creditor: Fraudulent conveyances: Husband and wife: Evidence: Burden of proof. (12) New trial: Newly discovered evidence.

Burch, Arpin v *619*

Carmichael, imp., Morris v *133*
Carpenter, The State v *165*
Case, C. Aultman & Co. v *612*
C. Aultman & Co. v. Case *612*

Appeal to S. C.: Exceptions: Instructions to jury: Sale of chattels: Damages.

Cayon v. The Dwelling House Insurance Company of Boston, Mass *510*

INSURANCE AGAINST FIRE. (1) Total loss: When over-estimate immaterial. (2) Evidence admitted for specific purpose. (3) Pleading: Affirmative defense. (4) Mortgage: Insurable interest. (5) Notary public not a "magistrate." (6) Proofs of loss: Waiver of defects.

Chapman v. Sutton *657*

Action for money paid on judgment: Receipt: Evidence: Appeal: Waiver.

Chase v. Gault and another *412*

(1) Contracts: Usage: Instructions to jury. (2) Costs.

Chicago, Milwaukee & St. Paul Railway Company, Miller, Administratrix, etc. v *184*
Chicago & Northwestern Railway Company, Fick v *469*
Chicago & Northwestern Railway Company, McQuade v. *616*

Digitized by Google

Chicago & Northwestern Railway Company, Washburn, by guardian ad litem, v. 474
Chicago, Wisconsin & Northern Railroad Company, Weyer v. 180
Childs and another v. The Harris Manufacturing Company 231

Joinder of causes of action: Judgment is a "contract."

Chippewa Logging Company, Early v. 112
Citizens' National Bank of Beloit and another, Frost, Assignee, etc. v. 234
Colclough v. Niland 309

Landlord and tenant: Appeal to S. C.: Evidence: Bill of exceptions.

Collette v. Weed and another 428

(1) Sale of chattels: Warranty: Parol evidence: Consideration. (2, 3) Pleading: Abatement of action prematurely brought.

Corning and others v. Hoyt and others, Garnishees, etc. 294

Garnishment: Service on principal defendant.

Curran, Administrator, etc. v. Witter 16

(1, 2) Certificates of deposit: Limitation of actions: When statute begins to run. (3) Limitation in case of death. (4) Evidence: Memoranda: Entries in account books.

De Camp, Taylor v. 162
Devlin and another, Ring v. 384
Dieves, Graeven v. 317
Divan, Executor, etc. v. Loomis and others 150

(1) Pleading: Demand and refusal. (2) Personal agreement.

Dosch and another, Washburn v. 436
Duffy v. Hickey 380

PRACTICE. (1) Change of venue: Motion after reference. (2) Reference: Correcting minutes of evidence: New trial. (3) Order of proof: Discretion. (4) Trial by referee: Improper evidence: Reversal of judgment. (5, 6) Taxation of costs: Remission of excess: Costs on former trial.

Digitized by Google

Duncan, Walker v *624*
Dwelling House Insurance Company of Boston, Mass., Cayon v..... *510*

Early v. Chippewa Logging Company..... *112*
Sale of chattels: Logs and timber: Acceptance: When scaling conclusive.

Ellis, Whereatt v..... *61*
Emery, Administrator, etc. v. Fugina and others..... *505*
Landlord and tenant: Growing crops.

Emil Kiewert Company v. Mariner and others, Garnishees, etc..... *296*
Garnishment: Service on principal defendant.

Fick v. The Chicago & Northwestern Railway Company..... *469*
Railroads: Master and servant: Liability for torts: Scope of employment: Special verdict.

Fifield, The Town of, and others, Sage and others v.... *546*
First National Bank of Dubuque v. Baker, Garnishee, etc..... *442*
VOLUNTARY ASSIGNMENT. (1) Preference of claims for wages, etc.: Repeal by implication. (2) Partnership: Exemptions. (3, 4) Fraud: Evidence: Acts of assignor: Preference of debt to assignee. (5) Place of assignment: Domicile.

Flanders and wife, Stoel, Executor, etc. v..... *256*
Frawley and another, The Plano Manufacturing Company v..... *577*
Fritz, impleaded with Blankenburg and another, German-American Savings Bank v..... *390*
Frost, Assignee, etc. v. Citizens' National Bank of Beloit and another..... *234*
CHATTEL MORTGAGES: VOLUNTARY ASSIGNMENT. (1) Description of property in mortgage: Certainty: Delivery. (2) Fraudulent conveyance: Remedy of assignee.

Frost, Muth v..... *425*
Fugina and others, Emery, Administrator, etc. v..... *505*

Digitized by Google

Fuhrman v. Jones and another 497

Debtor and creditor: Voluntary assignment: Attachment: Attorney acting as court commissioner.

Fuller & Johnson Manufacturing Company (Limited) v. Bartlett 73

PATENTS: EQUITY. (1) Jurisdiction of state courts. (2) Invention by employee: Implied contract to assign: License. (3) Specific performance.

Galloway v. Hamilton, imp. 651

Corporations: Deed, how executed: Ratification: Creditors' action.

Gates, Gaveney and another v. 1

Gault and another, Chase v. 412

Gaveney and another v. Gates 1

Sale of chattels: Contract construed.

German-American Savings Bank v. Fritz, impleaded with Blankenburg and another 390

Suretyship: Payment of judgment: Subrogation: Method of enforcing contribution.

Giblin, The State ex rel., v. The Supervisors of the Town of Union 158

Grady, Executor, etc., Smith and another v. 215

Graeven v. Dieves 317

Ejectment: Adverse possession.

Grafton, The Town of, The Town of Saukville v. 192

Green Bay, Winona & St. Paul Railroad Company, Hulehan v. 520

Hagenah, imp., Morse v. 603

Hall, Murphy v. 202

Hamilton, imp., Galloway v. 651

Harran, Atkinson v. 405

Harris Manufacturing Company, Childs and another v. 231

Hayes and others, Williams v. 248

Hickey, Duffy v. 380

Digitized by Google

Hiles, Treat and another v. *344*
Holmes, Marshall v. *555*
Hommel, Ramsay v. *12*
Hoyt and others, Garnishees, etc., Corning and others v. *294*
Hoyt, imp., and others, Garnishees, etc., Winner v. *278*
Hulehan v. Green Bay, Winona & St. Paul Railroad Company *520*

RAILROADS: MASTER AND SERVANT: NEGLIGENCE. (1) Obstructions on track: Negligence of co-employee. (2, 3) Knowledge of danger: Contributory negligence: Burden of proof. (4) Damages: Expense for medical attendance. (5) Appeal: Instructions to jury: Specific exception necessary.

Huntley, Administrator, etc., and others, Lamoreux v. .. *24*

Irvin and others v. Smith *220*

(1) Appeal to S. C.: Form of notice. (2) Execution: Correcting sheriff's return: Evidence.

Irvin and others v. Smith *227*

(1) Replevin: Return of property: Identity: Evidence. (2) Costs: Two appeals: Printed case.

Janesville, City of, McKeigue, Administrator, etc. v. *50*
Joint School District No. 7 of the Towns of Brighton and Paris in Kenosha County v. Kemen and others. *246*

APPEAL TO S. C. (1) When judgment appealable. (2) Appealable order.

Jones and another, Fuhrman v. *497*

Keaough, Town Treasurer, etc., The State ex rel. Terry v. *135*
Keep v. Quallman, imp. *451*

Assault and battery: Self-defense: Court and jury: Evidence.

Keepers and another, imp., Leslie v. *123*
Kelly v. Estate of Strong *152*

Agency: Evidence: Estates of decedents.

Kemen and others, Joint School District No. 7 of the Towns of Brighton and Paris in Kenosha County v. *246*

Digitized by Google

Kerkhof v. The Atlas Paper Company..... 674

Sale of chattels: Statute of frauds: Delivery: Part payment: Special verdict.

Kickland v. The Menasha Wooden Ware Company.... 34

VENDOR AND PURCHASER OF LAND. (1) Consideration: Parol evidence. (2) Statute of frauds. (3) Agency: Ratification. (4) Apportionment.

Killeen, Stebbins v..... 682

Klix, Administrator, etc. v. Nieman..... 271

Negligence: Unguarded excavation: Death of child.

Lamoreux v. Huntley, Administrator, etc., and others.. 24

(1) Mortgage: Tax deed and quitclaims taken as security. (2) *Bona fide* purchaser: Quitclaim. (3) Evidence: Declarations as to title. (4) Landlord and tenant: Notice of application for tax deed. (5) Possession of land: Notice to purchaser.

Landauer, Receiver, etc., Mechanics' National Bank of New York and another v..... 44

Leary v. Leary and wife..... 662

(1, 2) Real party in interest: Title to note: Burden of proof. (3, 5) Evidence: Immaterial errors. (4) Newly discovered evidence: Opening case: Terms. (6) Payment: Evidence. (7, 10) Foreclosure of mortgage: Form of judgment: *Lis pendens:* Appeal: Bill of exceptions. (8, 9) New trial: Appeal: Evidence. (11) Parent and child: Board, etc., furnished. (12) Constable: Service of subpœna: Return: Presumption. (13) Costs: Witnesses: Affidavit: Reversal of judgment.

Lehman and another v. Sherger and husband..... 145

Evidence: Declarations: Assignment.

Leon, Board of Supervisors and Town Clerk of the Town of, The State ex rel. Smith v..... 502

Leonard v. Yohnk and another, Sheriff, etc..... 587

Bankruptcy: Discharge: Judgment obtained pending proceedings: Injunction: Jurisdiction.

Leslie v. Keepers and another, imp..... 123

Settlement: Fraud: Rescission: Pleading: Evidence.

Loomis and others, Divan, Executor, etc. v..... 150

Digitized by Google

Mariner and others, Garnishees, etc., Emil Kiewert Company v 296
Marshall v. Holmes 555

(1, 2) Appeal to S. C.: Verdict: Evidence: Nonsuit. (3–5) Statute of limitations: New promise: Consideration: Part payment.

Marston and another, Pickert v 465
McFarland v. The State 400

Criminal law and practice: Former conviction procured by fraud: Plea of former conviction not an admission of guilt.

McGovern, Morawetz v 312
McKeigue, Administratrix, etc. v. The City of Janesville 50

HIGHWAYS: MUNICIPAL CORPORATIONS. (1) Defective highway: Notice of injury causing death. (2) Pleading: Pecuniary loss to children from death. (3, 4) Evidence: Expressions of pain: Ill health of dependent children. (5) Mayor as attorney against city. (6) When notice to alderman notice to city. Annuity tables. (8) Contributory negligence: Knowledge of danger.

McQuade v. The Chicago & Northwestern Railway Company 616

Contributory negligence: Pleading: Appealable order.

Mechanics' National Bank of New York and another v. Landauer, Receiver, etc. 44

RECEIVERS. (1) Action against receiver: Discretion. (2) Fraudulent conveyances: Parties. (3) Partnership: Loss of good will by receiver. (4) Removal of receiver.

Meinzer v. The City of Racine 241

Municipal corporations: Unauthorized change in grade of street.

Meissner, Intervener, Breslauer v 336
Meissner v. Meissner, Intervener 336

DEBTOR AND CREDITOR. (1) Creditors' bill: Intervention, when sustained. (2) Waiver of right to intervene.

Digitized by Google

Menasha Wooden Ware Company, Kickland v 34
Miller, Administratrix, etc. v. The Chicago, Milwaukee & St. Paul Railway Company 184

Railroads: Negligence: Presumption: Nonsuit.

Milwaukee & Northern Railroad Company, Garnishee, etc., O'Reilly v 212
Moe, Austin v 458
Morawetz v. McGovern 312

(1, 2) Instructions to jury: Immaterial error: Measure of damages. (3) Evidence: Collateral inquiries. (4) Interest: When demand becomes liquidated.

Morgan and others, Smith v 358
Morris v. Carmichael, imp 133

Tax deed: Limitation of actions: Proof of publication of notice of sale.

Morse v. Hagenah, imp 603

Partnership: Promissory notes.

Mullen and others v. Reinig, Garnishee, etc 408

New trial: Discretion: Appeal to S. C.: Bill of exceptions.

Munkwitz, Poposkey v 322
Murphy v. Hall 202

Tax sales: Description of land: Certainty: Constitutional law: Special legislation.

Muth v. Frost 425

Court and jury: Contributory negligence.

New Richmond Lumber Company v. Rogers 608

Taxation: Renewal of warrant: Levy.

Nicholls v. The State 416

CRIMINAL LAW AND PRACTICE. (1) Pleading: Burglary in day time. (2, 3) Constructive breaking. (4) Express car: "Railroad freight car." (5) Proof of ownership. (6) Failure of accused to be sworn: Comment by prosecutor: Presumption.

Nieman, Klix, Administrator, etc. v 271
Niland, Colclough v 309

Digitized by Google

Ordway, Wold v *176*
O'Reilly v. Milwaukee & Northern Railroad Company, Garnishee, etc. *212*
Liens: Action, legal or equitable? Garnishment.

Peitz v. The State *538*
Excise laws: Sale of beer by brewer in another town.

Peterson v. Baker, Garnishee, etc *451*
Phillips v. Root *128*
EXECUTION: HOMESTEAD. (1) Attachment: Withdrawal of traverse: Estoppel to claim exemption. (2) Sale of homestead with other tracts: Vacating sale. (3) Temporary removal.

Pickert v. Marston and another *465*
Agency: Sale of chattels: Warranty.

Plano Manufacturing Company v. Frawley and another *577*
(1) Appeal to S. C.: Verdict: Evidence. (2) Promissory note: Recovery on original contract: Amendment of pleading. (3) Evidence: Rebuttal. (4) Improper remarks to jury. (5–8) Partnership: Evidence: Attorney and client: Admissions and declarations.

Poposkey v. Munkwitz *322*
Landlord and tenant: Breach of covenant for quiet enjoyment: Measure of damages.

Popp v. Swanke and others *364*
Statute of frauds: Oral contract for the sale of lands: Specific performance.

Prescott, The City of, Schroth v. *678*
Putnam and another, Warren and others v. *481*

Quallman, imp., Keep v. *451*

Racine, The City of, Meinzer v. *241*
Ramsay v. Hommel *12*
Tax titles: Proof of publishing and posting notice of sale: Limitation of actions.

Digitized by Google

Reinig, Garnishee, etc., Mullen and others v. *408*
Ring v. Devlin and another *384*

Officers: Superintendent of county asylum: Reward for return of escaped lunatic.

Rogers, New Richmond Lumber Company v. *608*
Root, Phillips v. *128*

Sage and others v. The Town of Fifield and others *546*

(1) Equity: Injunction: Illegal tax. (2, 3) Highway taxes: Powers of electors and of supervisors.

Sasse v. The State *530*

CRIMINAL LAW AND PRACTICE. (1, 2) Improper remarks by prosecutor: Error, when cured: New trial. (3–5) View of premises: Presence of counsel: Absence of prisoner: Object: Evidence.

Saukville, The Town of, v. The Town of Grafton *192*
Schroth v. The City of Prescott *678*

Municipal corporations: Defective sidewalk: Court and jury: Excessive damages.

Semple v. Whorton and others *626*

(1) Tax deed: Defective execution: Redemption. (2) Deed: Breach of covenants: Sale for taxes. (3) Wife joining in deed to bar dower: Liability on covenants. (4–5) Failure of title to part of land conveyed: Measure of damages: Evidence.

Shell Lake Lumber Company, Smith v. *89*
Sherger and husband, Lehman and another v. *145*
Silverthorn, Will of *372*
Smith and another v. Grady, Executor, etc. *215*

(1) Foreign judgment: Jurisdiction: Personal service of process in another county. (2) Estates of decedents: Extending time to present claims: Abuse of discretion.

Smith, Irvin and others v. *220, 227*
Smith v. Morgan and others *358*

Logs and timber: Public lands: Wrongful cutting: Measure of damages: Joinder of parties.

Smith v. The Shell Lake Lumber Company *89*

Logs and lumber: Lien for labor: Purchaser without notice.

Digitized by Google

Smith, The State ex rel., v. The Board of Supervisors and Town Clerk of the Town of Leon 502

State v. Carpenter 165

Navigable river: Obstruction: Injunction.

State, McFarland v. 400

State, Nicholls v. 416

State, Peitz v. 538

State, Sasse v. 530

State ex rel. Giblin v. The Supervisors of the Town of Union 158

Highways: Lands entirely surrounded: Filing order: Payment of advantages assessed.

State ex rel. Smith v. The Board of Supervisors and Town Clerk of the Town of Leon 502

Ditches and drains: Preservation of highways: Appointment of appraisers: Claim for damages.

State ex rel. Terry v. Keaough, Town Treasurer, etc. 135

Excise laws: Licenses to sell intoxicating liquors: Towns and villages: Census.

Stebbins v. Killeen 682

Appeal: Evidence to sustain verdict.

Stoel, Executor, etc. v. Flanders and wife 256

Contract to maintain parents: Mortgage: Satisfaction: Condition precedent.

Strong, Estate of, Kelly v. 152

Supervisors and Town Clerk of the Town of Leon, The State ex rel. Smith v. 502

Supervisors of the Town of Union, The State ex rel. Giblin v. 158

Sutton, Chapman v. 657

Swanke and others, Popp v. 364

Taylor v. De Camp 162

Rock county municipal court: Jurisdiction of appeals: Constitutional law: Forcible entry and unlawful detainer.

Digitized by Google

Terry, The State ex rel. v. Keaough, Town Treasurer, etc. 135
Town of Saukville v. The Town of Grafton 192

(1) Appeal to S. C.: Exceptions to finding of facts. (2) Paupers: Legal settlement.

Treat and another v. Hiles 344

Contracts: Partnership: Statute of frauds.

Union, Supervisors of the Town of, The State ex rel. Giblin v. 158

Voelz v. Breitenfield 491

FENCES. (1) Rebuilding partition fence: Service of notice of appraisement. (2) Certificate of fence viewers of expense. (3) Penal statute: Strict compliance.

Walker, Brickley and another v. 563
Walker v. Duncan 624

(1) Pleading: Variance: Waiver of tort. (2) Logs and lumber: Evidence of quantity.

Warren and others v. Putnam and another 481

Logs and timber: Damages for cutting: Good faith: Mistake of law.

Washburn v. Dosch and another 436

(1) Pleading: Counterclaim: Defense. (2) Contracts: Restraint of trade. (3) Statute of frauds.

Washburn, by guardian ad litem, v. The Chicago & Northwestern Railway Company 474

Negligence: Highways: Pleading.

Weed and another, Collette v. 428
Western Assurance Company, Bonneville v. 298
Weyer v. Chicago, Wisconsin & Northern Railroad Company 180

RAILROADS: CONDEMNATION OF LAND. (1) Damage to land not taken: What may be considered. (2) Value of land taken: Probable income. (3) Instructions to jury: Immaterial error.

Digitized by Google

Whereatt v. Ellis 61

(1, 2) Judgment by default: Conditional order: Stay of proceedings: Appeal to S. C. (3) "Recovery of money only." (4) Interest: Pleading. (5) Vacating judgment: Terms: Discretion. (6) Appealable order.

Whorton and others, Semple v. 626

Will of Silverthorn 372

WILLS: EVIDENCE. (1, 3) Testamentary capacity: Burden of proof. (2) Transactions with deceased: Competency of devisee to testify.

Willard v. Bosshard 454

Statute of frauds: Promise to pay debt of another.

Williams v. Hayes and others 248

Judgment: Correction and amendment: *Res adjudicata:* Dismissal of complaint.

Winner v. Hoyt imp., and others, Garnishees, etc. 278

GARNISHMENT. (1) Service on principal defendant: Jurisdiction. (2) Service on one partner only. (3) Diligence in finding defendant.

Witter, Curran, Administrator, etc. v. 16

Wold v. Ordway 176

(1) Justices' courts: Appeal: New judgment: Interest. (2) Costs: Reversal of judgment.

Yohnk and another, Sheriff, etc., Leonard v. 587

Digitized by Google

TABLE OF CASES

CITED BY THE COURT.

N. B.—The abbreviation W. is used for Wisconsin Reports.

Adams v. Filer, 7 W. 306 - 286
Ætna L. Ins. Co. v. McCormick, 20 W. 265 - - - 253
Agawam Co. v. Jordon, 7 Wall. 602 - - - - - 86
Ahern v. Goodspeed, 72 N. Y. 108 - - - - - - 467
Alexander v. Kimbro, 49 Miss. 529 - - - - - - 353
Allen v. Allen, 58 W. 206 - 320
——— v. Harrison, 30 Vt. 219 584
Anderson v. Patterson, 64 W. 557 - - - - - - 202
Andrews v. Fielding, 20 Fed. Rep. 123 - - - - - 81
——— v. Jenkins, 39 W. 476 94
Angell v. Draper. 1 Vern. 399 655
Appleton v. Bacon, 2 Black, 699 - - - - - - 80
Arians v. Brickley, 65 W. 26 576
Arndt v. Harshaw, 53 W. 269 574
Att'y Gen. v. Cleaver, 18 Ves. 217 - - - - - - 173
——— v. Cohoes Co. 6 Paige, 133 - - - - - - 173
——— v. Great Eastern Ry. 33 Eng. (Moak), 768 - - 246
——— v. Johnson, 2 Wils. Ch. 101 - - - - - - 172
——— v. R. & T. Co. 3 N. J. Eq. 136 - - - 172, 174
Au Sable R. Boom Co. v. Sanborn, 36 Mich. 358 - - 97

Bacon v. Bacon, 43 W. 209 - 308
——— v. Charlton, 7 Cush. 581 57
——— v. Eccles, 43 W. 227, 676
Badger v. Glens Falls Ins. Co. 49 W. 389 - - - - - 520
——— v. Phœnix Ins. Co. 49 W. 396 - - - - - 520
Bain v. Fothergill, L. R. 7 Eng. & Ir. App. 158 - - 328
Baldwin v. Ely, 66 W. 181 211, 633
Ballou v. C. & N. W. R. Co. 53 W. 150 - - - - - 247
Bammessel v. B. F. Ins. Co. 43 W. 463 - - - - - 516
Bank of Orleans v. Merrill, 2 Hill, 295 - - - - - 19
Barber v. Merriam, 11 Allen, 322 - - - - - - 57
Barnard v. Backhaus, 52 W. 593 - - - - - - 677
Barnes v. Smith, 16 Abb. Pr. 420 - - - - - - 233
Barns v. Learned, 5 N. H. 264 638
Bartelt v. Braunsdorf, 57 W. 3 - - - - - - 627, 636
Bates v. Chesebro, 32 W. 594 676-7
——— v. ———, 36 W. 636 676-7
Bayliffe v. Butterworth, 1 Exch. 425 - - - - - 467
Beall v. White, 94 U. S. 382 95, 103, 110
Beard v. Dedolph, 29 W. 136 571
Beck v. Burdett, 1 Paige, 305 654
Beemis v. Weege, 67 W. 435 633
Belden v. Seymour, 8 Conn. 304 - - - - - - 38
Bellows Falls Bank v. Rutland Co. Bank, 40 Vt. 377 - - 21
Bender v. Fromberger, 4 Dall. 441 - - - - - - 649
Bennett v. Tregent, 24 U. C. C. P. 565 - - - - - 435
Bentley v. Doggett, 51 W. 224 467
Berg v. C., M. & St. P. R. Co. 50 W. 427 - - - - - 59
Bergamini v. Bastian, 48 Am. Rep. 216 - - - - - 439

Digitized by Google

Bergeron v. Richardott, 55 W. 129 - - - - - - 80
Bessex v. C. & N. W. R. Co. 45 W. 479 - - - - - 526
Binney v. Annan, 107 Mass. 94 81
Birge v. Gardiner, 19 Conn. 507 - - - - - - - 276
Bischoff v. Wethered, 9 Wall. 812 - - - - - - - 218
Blake v. Doherty, 5 Wheat. 362 - - - - - - - 208
Blakeney v. Goode, 30 Ohio St. 350 - - - - - - - 356
Blanchard v. McDougal, 6 W. 167 - - - - - - - 368
Blandy v. Griffith, 3 Fish. Pat. Cas. 615 - - - - - 86
Blossom v. Knox, 3 Pin. 262 327–8
Blundell v. Catterall, 5 Barn. & Ald. 268 - - - - - 172
Bogie v. Bogie, 41 W. 209 152, 264
Bonesteel v. Orvis, 22 W. 523 624
Bookhout v. State, 66 W. 415 164–5
Boorman v. Jenkins, 12 Wend. 566 - - - - - - - 435
Boothby v. Scales, 27 W. 626 434
Bostwick v. Abbott, 40 Barb. 331 - - - - - - - 254
Bouck v. Enos, 61 W. 664 - 467
Bowen v. Bell, 20 Johns. 338 38
——— v. Hastings, 47 W. 232 292
Boynton v. Ball, 105 Ill. 634 592, 595
Brabbitts v. C. & N. W. R. Co. 38 W. 289 - - - - 526
Brachman v. Kuehnmuench, 64 W. 249 - - - - - 618
Bradford v. Rice, 102 Mass. 472 - - - - - - - 597
Bradley v. Denton, 3 W. 557 331
Brainard v. Van Kuran, 22 Iowa, 261 - - - - - - 654
Braman v. Snider, 21 Fed. Rep. 871 - - - - - 597
Brandeis v. Neustadtl, 13 W. 142 - - - - - - - 368
Bremmer v. G. B., S. P. & N. R. Co. 61 W. 114 - - 535
Breslauer v. Geilfuss, 65 W. 377 - - - - - 339, 571
Brewer v. Franklin Mills, 42 N. H. 292 - - - - - 397
——— v. Hill, 2 Anstr. 413 - 352
Brewster v. Carmichael, 39 W. 456 - - - - - - - 488
Brinkman v. Jones, 44 W. 498 30
Brooks v. Ry. Co. 101 U. S. 443 109
Brosnan v. McKee, 59 Mich. 107 - - - - - - - 354
Brower v. Merrill, 3 Pin. 46 - 464
Brown v. Bosworth, 58 W. 379 - - - - - - - 489
——— v. C., M. & St. P. R. Co. 54 W. 342 - - - 330
——— v. Pratt, 4 W. 513 - 611
——— v. Swineford, 44 W. 282 535
Brummagim v. Tallant, 29 Cal. 503 - - - - - 20
Bryant v. Small, 35 W. 208 - 105
Bull v. Bell, 4 W. 54 - - 30
Bunn v. Valley Lumber Co. 63 W. 630 - - - 70, 412
Burbank v. Woodward, 124 Mass. 357 - - - - - 254
Burdon v. Barkus, 3 Giff. 412 352
Burhans v. Van Zandt, 7 N. Y. 525 - - - - - - 254
Burrill v. Daggett, 77 Me. 545 441
Bussian v. M., L. S. & W. R. Co. 56 W. 332 - - - - 128
Butler v. People, 4 Denio, 68 420
——— v. Regents, 32 W. 124 128

Cairns v. O'Bleness, 40 W. 469 381
Caldwell v. Murphy, 11 N. Y. 416 - - - - - - - 57
Campbell v. Campbell, 37 W. 206 - - - - - - - 308
——— v. Packard, 61 W. 88 207
——— v. Thomas, 42 W. 439 369, 371
Candee v. W. U. Tel. Co. 34 W. 471 - - - - - 330
Canfield v. Smith, 34 W. 381 494
——— v. Watertown F. Ins. Co. 55 W. 423 - - - - 128
Carney v. Gleissner, 62 W. 498 571, 576
Carr v. Leavitt, 54 Mich. 540 354
Carter v. W., St. L. & P. R. Co. 137 Mass. 187 - - - - 254
Cassidy v. Begoden, 38 N. Y. Super. Ct. 180 - - - 435
Caswell v. C. & N. W. R. Co. 42 W. 193 - - - - - 683
Cate v. Patterson, 25 Mich. 191 - - - - - - - 21
Caulkins v. Harris, 9 Johns. 325 - - - - - - - 649
Chabot v. Am. B. H. & O. Co. 6 Fish. Pat. Cas. 71 - - 84
Chamberlain v. Dickey, 31 W. 68 - - - - - - - 663
Chapman v. Kirby, 49 Ill. 211 335
——— v. Wadleigh, 33 W. 267 92
Chas. Baumbach Co. v. Miller, 67 W. 449 - - - 234, 240

Digitized by Google

Clapp v. Webb, 52 W. 638 - 457
Clark v. Pinney, 6 Cow. 297 661
——— v. Rowling, 3 N. Y. 216 - - - - - - 596
Clay v. Tyson, 19 Neb. 530 - 585
Cockburn v. Ashland Lumber Co. 54 W. 619 - - - 330
Cohn v. Neeves, 40 W. 393 - 494
Cole, Will of, 49 W. 179 - 379
———, 52 W. 591 - - - 253
Collar Co. v. Van Dusen, 23 Wall. 563 - - - - - 86
Collins v. Hatch, 18 Ohio, 523; 51 Am. Dec. 465 - - - 246
Comm. v. Reynolds, 122 Mass. 454 - - - - - - 420
Congar v. Chamberlain, 14 W. 258 - - - - - - 433
Conklin v. Hawthorn, 29 W. 476 - - - - - - 361
Cont. W. Co. v. Empire W. Co. 4 Fish. Pat. Cas. 428 80, 81
Cook v. St. P., M. & M. R. Co. 34 Minn. 45 - - - - 528
——— v. Tullis, 18 Wall. 332 656
Cooper v. Reynolds, 10 Wall. 317 - - - - - - 287
Cornell v. Radway, 22 W. 260 343, 654, 655
Corning v. Southland, 3 Hill, 552 - - - - - - 41
Cottrell v. Babcock P. P. M. Co. 54 Conn. 122 - - 439
Coyle v. Davis, 20 W. 564 - 357
Cramer v. Hanaford, 53 W. 85 194
Crocker v. Currier, 65 W. 662 670
Crossett v. Janesville, 28 W. 420 - - - - - - 245
Cummings v. Nat. F. Co. 60 W. 603 - - - - - 189
Cunningham v. Brown, 44 W. 72 - - - - - - 30
——— v. Lyness, 22 W. 245 - 618
Cuthbert v. Appleton, 24 W. 387 - - - - - - 528
Cutts v. Rock Co., 58 W. 641 673
Cuyler v. Ensworth, 6 Paige, 32 - - - - - - 398

Dale v. Hamilton, 2 Phil. 266 352
Davis v. Mayor, 14 N. Y. 506: 67 Am. Dec. 186 - - 246
Dawson v. Hartsfield, 79 N. C. 334 - - - - 598, 600
De Forest v. Holum, 38 W. 516 37
De Groff v. Am. L. T. Co. 21 N. Y. 127 - - - - - 42
Delorme v. Ferk, 24 W. 201 208
Desborough v. Rawlins, 3 Mylne & C. 515 - - - 584
Dietrich v. Koch, 35 W. 618 - 239
Dingle v. Hare, 97 Eng. C. L. 145 - - - - - - 467
Doane v. Garretson, 24 Iowa, 351 - - - - - - 110
Dobbs v. Enearl, 4 W. 451 90, 91
——— v. Green, 2 W. 228 - 91
Docter v. Hellberg, 65 W. 421 208, 627, 636
Dore v. Milwaukee, 42 W. 108 245
Dorsey v. P. & C. Const. Co. 42 W. 583 - - - - - 526
Douglass v. State, 4 W. 387 - 173
Doutelle v. Smith, 116 Mass. 111 - - - - - - - 441
Downes v. Phœnix Bank, 6 Hill, 297 - - - - - 22
Downey v. Hendrie, 46 Mich. 498 - - - - - - 423
Dresser v. Brooks, 3 Barb. 429 599
Drew v. Baldwin, 48 W. 529 268, 270
Ducher v. State, 18 Ohio, 308 - - - - - 422–424
Dunklee v. Crane, 103 Mass. 470 - - - - - - 109
Dunlop v. Gregory, 10 N. Y. 241 - - - - - - 441
Durning v. Burkhardt, 34 W. 585 - - - - - - 253
Duryea v. Burt, 28 Cal. 569 - 354
Dwight v. Hamilton, 113 Mass. 175 - - - - - 441

Edgerly v. Emerson, 23 N. H. 555 - - - - - - 397
Edleman v. Kidd, 65 W. 25 - 69
Edwards v. Derrickson, 28 N. J. Law, 39 - - - - - 109
——— v. Stevens, 3 Allen, 315 571
Ehle v. Brown, 31 W. 405 - 80
Eldred v. Leahy, 31 W. 546 - 494
Ely v. Wilcox, 20 W. 523 - 80
Emerson v. Durand, 64 W. 111 - - - - - - 464
Engmann v. Estate of Immel, 59 W. 249 - - - - - 559
Esty v. Aldrich, 46 N. H. 127 - - - - - - 356
Evans v. Rugee, 57 W. 623 - 574
——— v. ———, 63 W. 31 - 410
Everdell v. S. & F. du L. R. Co. 41 W. 395 - - - 290
Everett v. Derby, 5 Law Rep. 225 - - - - - 594
Everingham v. Meighan, 55 W. 354 - - - - - - 677

Digitized by Google

Fairbank v. Leary, 40 W. 637 441
Fairbanks v. Holliday, 59 W. 80 - - - - - - - 410
Fay v. Harlan, 128 Mass. 244 57
Fellows v. Smith, 130 Mass. 378 - - - - - - 149
Fells Point Sav. Inst. v. Weedon, 18 Md. 320 - - 21
Ferguson v. Carrington, 9 Barn. & C. 59 - - - 41
——— v. State, 49 Ind. 33 - 535
Fertilizing Co. v. Hyde Park, 97 U. S. 660 - - - - 246
Fery v. Pfeiffer, 18 W. 510 - 30
First Nat. Bank v. Baker, 68 W. 442 - - - - - - 451
——— v. Hackett, 61 W. 335 - 445
Fleming v. Beaver, 2 Rawle, 128; 19 Am. Dec. 629 - - 397
——— v. Grafton, 54 Miss. 79 654
Fletcher v. Ingram, 46 W. 204 - - - - - - 605
Flureau v. Thornhill, 2 W. Bl. 1078 - - - - - 327-330
Forster v. Hale, 5 Ves. Jr. 314 352
Foster v. "The Richard Busteed," 100 Mass. 409 - - 254
Fowler v. Rapley, 15 Wall. 328 - - - - - - 95
Foye v. Patch, 132 Mass. 105 - 254
Frazier v. Miller, 16 Ill. 49 - 264
Freer v. Denton, 61 N. Y. 492 - - - - - - 233
Frink v. Branch, 16 Conn. 261 353
Fuller v. M. M. Ins. Co. 36 W. 599 - - - - - - 303
——— v. Wilcox, 19 Wend. 351 - - - - - - 674
Furnold v. Bank, 44 Mo. 336 - 398

Gallagher v. Bishop, 15 W. 276 - - - - - - 612
Gallinger v. Lake Shore Traffic Co. 67 W. 529 - - - 424
Gano v. C. & N. W. R. Co. 60 W. 12 - - - - - 43
Ganter v. Atkinson, 35 W. 48 - - - - - - - 355
Gates v. Boomer, 17 W. 455 343, 654
Gayler v. Wilder, 10 How. 493 - - - - - - 80
Gee v. Bolton, 17 W. 604 - 30
Geise v. Greene, 49 W. 334 - 164
Georgetown v. Canal Co. 12 Pet. 91 - - - - - - 173
Ghenn v. Provincetown, 105 Mass. 313 - - - - - 681
Gilbert v. Morris C. & B. Co. 8 N. J. Eq. 495 - - - 174
Gilkey v. Merrill, 67 W. 459 552
Gillard v. Bates, 6 Mees. & W. 547 - - - - - - 584
Gillett v. Treganza, 6 W. 343 351
Gilman v. Milwaukee, 61 W. 592 - - - - - - 246
Godeffroy v. Caldwell, 2 Cal. 489 - - - - - - 358
Godfrey v. White, 43 Mich. 171 354
Goodno v. Oshkosh, 31 W. 127 - - - - - - 144
Goodyear v. Watson, 14 Barb. 481 - - - - - - 398
Gore v. Brazier, 3 Mass. 543 649, 650
Gramlich v. Wurst, 86 Pa. St. 74 - - - - - - 275
Grannis v. Hooker, 29 W. 65 626
Grant v. Whitwell, 9 Iowa, 152 - - - - - 103, 110
Graves v. Legg, 2 Hurl. & N. 210 - - - - - 467-8
Gray v. McLaughlin, 26 Iowa, 279 - - - - - - 57
Green v. Williams, 45 Ill. 206 335
Greene v. Harris, 9 R. I. 401 356
Griswold v. Jackson, 2 Edw. Ch. 461 - - - - - 254

Hackney v. Vrooman, 62 Barb. 650 - - - - - - 149
Hadley v. Baxendale, 9 Exch. 341; 26 E. L. & Eq. 398 330, 334
Haggerty v. Amory, 7 Allen, 458 - - - - - - 598
Haifley v. Haynes, 31 Mich. 535 - - - - 97, 111
Hall v. Gale, 20 W. 292 - 43
——— v. Hinckley, 32 W. 362 91, 105, 109
Hammel v. Schuster, 65 W. 669 - - - - - - 501
Hammer v. Schœnfelder, 47 W. 455 - - - - - 330
Hammond v. M. & H. O. Co. 92 U. S. 724 - - 80, 152
Hanley v. Wood, 2 Barn. & Ald. 724 - - - - 352
Hannan v. Oxley, 23 W. 519, 37, 644
Hanson v. Roter, 64 W. 622 676-7
Hapgood v. Hewitt, 119 U. S. 226; 11 Fed. Rep. 422; 11 Biss. 184 - - 84, 86, 87
——— v. Rosenstock, 23 Fed. Rep. 86 - - - 81, 87

Digitized by Google

Hardcastle v. South Yorkshire R. Co. 4 Hurl. & N. 67 - 274
Hargous v. Stone, 5 N. Y. 73 - 435
Hargreaves v. Deacon, 25 Mich. 1 - - - - - - 275
Harlow v. Thomas, 15 Pick. 66 - - - - - - - 638
Harrison v. Doyle, 11 W. 88 164–5
Hartell v. Tilghman, 99 U. S. 547 - - - - - - 79
Haseltine v. Mosher, 51 W. 443 - - - - - - 488
——— v. Simpson, 61 W. 427 247
Haslet v. Street, 2 McCord, 310; 13 Am. Dec. 724 - - 292
Hatch v. Mann, 15 Wend. 44 389
Haven v. Baldwin, 5 Iowa, 505 - - - - - - 69
Hawk v. Thorn, 54 Barb. 164 233
Hawks v. Pritzlaff, 51 W. 160 239
Hayter v. Tucker, 4 Kay & J. 249 - - - - - - 352
Haywood v. Haywood, 10 Allen, 105 - - - - - 149
Healey v. Butler, 66 W. 14 - 290
Heath v. Heath, 31 W. 223 - 357
Hendrie v. Sayles, 98 U. S. 546 - - - - - - 80
Herring v. Skaggs, 62 Ala. 180; 34 Am. Rep. 4 - - 467
Hewett v. Currier, 63 W. 386 92, 105
Hewitt v. Week, 59 W. 447 - 633
Hewlins v. Shippam, 5 Barn. & C. 229 - - - - - 352
Hibbard v. W. U. Tel. Co. 33 W. 558 - - - - - - 330
Hiles v. Hanover F. Ins. Co. 65 W. 585 - - - - - 517
Hilgers v. Quinney, 51 W. 70 15
Hill v. Buckley, 17 Ves. 401 - 435
——— v. Harding, 107 U. S. 631 - - - - - - 600
——— v. Palmer, 56 W. 123 348, 355
Hills v. Parker, 7 Jur. (N. S.), 833 - - - - - - 352
Hinton v. C. C. R. Co. 65 W. 331 - - - - - - 424
Hisey v. Troutman, 84 Ind. 115 - - - - - - 508
Hitchens v. Nougues, 11 Cal. 29 - - - - - - - 358
Hoare v. Hindley, 49 Cal. 274 355
Hodge v. Sawyer, 34 W. 397 - 69
Hoffman v. State, 65 W. 46 - 424
Hogan v. C., M. & St. P. R. Co. 59 W. 139 - - 473, 481
Hoile v. Bailey, 58 W. 434 457–8
Holendyke v. Newton, 50 W. 635 - - - - - - 384
Holmes v. Remsen, 7 Johns. Ch. 286 - - - - - - 254
——— v. Sawtelle, 53 Me. 179 149
Honzik v. Delaglise, 65 W. 501 639
Hopkins v. Hopkins, 40 W. 462 308
Horner v. C., M. & St. P. R. Co. 38 W. 165 - - - 37
Hoth v. Peters, 55 W. 405 - 527
Hough v. Ry. Co. 100 U. S. 225 527
Houghton v. Milburn, 54 W. 554 - - - - - - 571
Hounsell v. Smyth, 7 C. B. (N. S.), 731 - - - - - 275
Houston v. Laffee, 46 N. H. 507 - - - - - - 353
Hoxie v. Price, 31 W. 82 - 571
Hoye v. C. & N. W. R. Co. 65 W. 243 - - - - - 247
Hubbell v. McCourt, 44 W. 584 70
Hudson v. McCartney, 33 W. 331 - - - - - - - 268
Huling v. State, 17 Ohio St. 583 - - - - - - 424
Huse v. Washburn, 59 W. 414 670
Hutchinson v. C. & N. W. R. Co. 37 W. 582 - - - 183
——— v. ———, 41 W. 555 - 183
Hyde v. Chapman, 33 W. 391 343
Hydraulic Works Co. v. Orr, 83 Pa. St. 332 - - - 276

Ind. & St. L. R. Co. v. Horst, 93 U. S. 291 - - - - 527
Ins. Co. v. Mosley, 8 Wall. 397 57
Internat. L. Ins. Co. v. Scales, 27 W. 640 - - - - - 633
Irvin v. Smith, 66 W. 119 - 223

Jackson v. State, 55 W. 589 - 424
Jacoby v. Whitmore 49 Law T. (N. S.), 337 - - - 440
Jaquish v. Ithaca, 36 W. 108 58, 683
Jarvis v. Barrett, 14 W. 591 - 218
Jefferson Co. Bank v. Robbins, 67 W. 68 - - - 70
Jenkins v. Steanka, 19 W. 126 622
Jessup v. Stone, 13 W. 467 - 93
Jilson v. Gilbert, 26 W. 637 - 357, 441
Johannes v. Youngs, 42 W. 401 - - - - - - 247
Johnson v. Ashland Lumber Co. 52 W. 458 - - - 207
Johnston v. Comm. 85 Pa. St. 54; 82 Pa. St. 306 - - 422

Digitized by Google

Joliet Mfg. Co. v. Dice, 105 Ill. 649 - - - - - - 87
Jones v. Green, 1 Wall. 330 - 654
——— v. S. & F. du L. R. Co. 42 W. 306 - - - - - 618
Judd v. Fox Lake, 28 W. 588 549, 552

Karber v. Nellis, 22 W. 215 - 464
Keffe v. M. & St. P. R. Co. 21 Minn. 207 - - - - - 276
Kelley v. Kelley, 20 W. 443 - 33
Kellogg v. Larkin, 3 Pin. 141 440
——— v. Nelson, 5 W. 125 - 268
Kelly v. C., M. & St. P. R. Co. 50 W. 381 - - - 56
——— v. C. & N. W. R. Co. 60 W. 480 - - - - - 527
Kempton v. Burgess, 136 Mass. 192 - - - - - - 254
Kerr v. Forgue, 54 Ill. 482 - 277
Kilgore v. Bulkley, 14 Conn. 362 - - - - - - 19
Killips v. Putnam F. Ins. Co. 28 W. 480 - - - - - 520
Kimball v. Walker, 30 Ill. 510 38
King v. Gedney, 1 MacArth. Pat. Cas. 444 - - - 86
Klatt v. Milwaukee, 53 W. 196 - - - - - - 681
Klauber v. Biggerstaff, 47 W. 551 - - - - - - 19
Kloeckner v. Bergstrom, 67 W. 197 - - - 234, 240
Knox v. Webster, 18 W. 406 464
Kollock v. Parcher, 52 W. 399 457
Koons v. St. L. & I. M. Ry. 65 Mo. 592 - - - - - 276
Krouskop v. Shontz, 51 W. 215 - - - - - - 571
Kruse v. Thompson, 26 Minn. 424 - - - - - - 96

Labouchere v. Dawson, L. R. 13 Eq. 322 - - - - - 439
Lackner v. Salomon, 9 W. 129 - - - - - - 464
Lampson v. Bowen, 41 W. 484 - - - 92, 105, 109
Lamson v. Moffat, 61 W. 153 507
Lansing v. Russell, 13 Barb. 510 - - - - - - 254
Larimore v. Wells, 29 Ohio St. 13 - - - - - - 149
Latimer v. Morrain, 43 W. 107 - - - - 255, 671
Lauer v. Bandow, 48 W. 638 292
Lawson v. Schnellen, 33 W. 288 - - - - - - 551
Leisherness v. Berry, 38 Me. 80 - - - - - - 109
Leland v. Stone, 10 Mass. 459 637-8, 640, 644, 650
Le Neve v. Le Neve, 3 Atk. 655 - - - - - - 43
Lesley v. Rosson, 39 Miss. 368 353
Lidderdale's Ex'rs v. Robinson's Ex'rs, 12 Wheat. 594 398
Littlefield v. Littlefield, 51 W. 23 - - - - - 148-9
Logan City v. Buck, 4 Am. & Eng. Corp. Cas. 300 - - 246
Lord v. Parker, 3 Allen, 127 - 571
Loucheine v. Strouse, 49 W. 623 - - - - - - 671
Lowther v. Comm. 1 Hen. & M. 202 - - - - - 649
Lyle v. Dellinger, 54 W. 404 683
Lynch v. E., L. F. & M. R. Co. 57 W. 430 - - - 551

Madden v. Springfield, 131 Mass. 441 - - - - - 55
Mahaney v. Penman, 4 Duer, 603 - - - - - - 233
Manbury v. Stonestreet, 1 Md. 152 - - - - - - 435
Mann v. Ætna Ins. Co. 38 W. 114 - - - - - - 661
Markham v. State, 25 Ga. 52 424
Marsh v. Fraser, 27 W. 596 - 214
Marston v. Hobbs, 2 Mass. 433 649
Martin v. Morris, 62 W. 418 - 32
——— v. Veeder, 20 W. 466 - 268
Mason v. H. Whitbeck Co. 35 W. 164 - - - - - 676
——— v. Pierron, 63 W. 244 397
Mason's Ex'rs v. Alston, 9 N. Y. 28 - - - - - - 254
Matteson v. N. Y. C. R. Co. 62 Barb. 364 - - - - 57
Mayor v. Hughes, 1 Gill & J. 480; 19 Am. Dec. 243 - 246
McClellan v. Sanford, 26 W. 595 - - - - 357, 441
McClurg v. Kingsland, 1 How. 202 - - - - - 82, 83
McCoy v. Quick, 30 W. 521 - 105
M'Crea v. Purmort, 16 Wend. 460 - - - - - - 38
McDaniel v. Lee, 37 Mo. 206 398-9
McElwain v. Willis, 9 Wend. 548 - - - - - - 654
McEwan v. Zimmer, 38 Mich. 765 - - - - - - 218

Digitized by Google

McIndoe v. Hazelton, 19 W. 567 - - - - - - 602
M'Kay v. Rutherford, 13 Jur. 21 - - - - - - - 355
McLimans v. Lancaster, 57 W. 297 - - - - - - 410
McNab v. Noonan, 20 W. 434 164
McNairy v. Eastland, 10 Yerg. 310 - - - - - - 654
McNamara v. Clintonville, 62 W. 207 - - - - 330, 527
Mead v. Chippewa Co. 41 W. 205 - - - - - - 194
Meade v. Black, 22 W. 241 - 33
——— v. Gilfoyle, 64 W. 18 - 206, 208
Mecklem v. Blake, 22 W. 495 644
Meese v. Fond du Lac, 48 W. 323 - - - - - - 54
Mendenhall v. Steckel, 47 Md. 453 - - - - - - 435
Merchants' Bank v. State Bank, 10 Wall. 604 - - 43
Merriam v. Field, 24 W. 640 - 434
Messer v. Oestreich, 52 W. 684 328, 627, 635-6
Meyer v. Foster, 16 W. 294 - 674
Milburn, *In re*, 59 W. 34 - 287
Miller v. Austen, 13 How. 218 19
——— v. Kendig, 55 Iowa, 174 354
Milwaukee Co. v. Pabst, 64 W. 247 - - - - - - 72
Mitchell v. Pillsbury, 5 W. 407 - - - - - - 634
——— v. Rolison, 52 W. 155 - 671
Montague v. Horton, 12 W. 599 - - - - - - - 343
Montgomery v. McGee, 7 Humph. 234 - - - 654
Moore v. Wayne Circuit Judge, 55 Mich. 87 - - 287
Morehouse v. Comstock, 42 W. 626 - - - - - - 433
Morgan v. Bishop, 61 W. 410 72
Morris v. Niles, 67 W. 341 - 671
——— v. Phelps, 5 Johns. 49 - 636
Morrow v. Reed, 30 W. 81 - 238
Mowry v. White, 21 W. 417 - 622
Mulcairns v. Janesville, 67 W. 24 - - - - - - - 59
Mundorff v. Wickersham, 63 Pa. St. 87 - - - - 41
Munger v. Albany City Nat. Bank, 85 N. Y. 589 - - 21
Munkwitz v. C., M. & St. P. R. Co. 64 Wis. 403 - - 537
——— v. Uhlig, 64 W. 380 - 330
Murley v. Ennis, 2 Colo. 300 - 354
Murray v. Abbot, 61 W. 198 - 357
Musier v. Trumpbour, 5 Wend. 274 - - - - - 354

Nat. Bank of Fort Edward v. Wash. Co. Nat. Bk. 5 Hun, 605 - - - - - - 21
Neal v. Nash, 23 Ohio St. 483 398
Nelson v. Matthews, 2 Hen. & M. 164 - - - - - - 649
Nelson Lumber Co. v. Loraine, 24 Fed. Rep. 456 - 553
Nesmith v. Calvert, 1 Wood. & M. 34 - - - - 79, 80
Nevil v. Clifford, 55 W. 161 - 552
New Bedford Inst. v. Hathaway, 134 Mass. 69; 45 Am. Rep. 289 - - - - - 397
Nichol v. Alexander, 28 W. 118 - - - - - - 328
Nichols v. Mitchell, 30 W. 329 676
Noonan v. Ilsley, 21 W. 138 - 43
Norden v. Jones, 33 W. 600 - 626
North American F. Ins. Co. v. Graham, 5 Sandf. 197 - - 654
Nutting v. Herbert, 35 N. H. 120 - - - - - - - 638

Oard v. Oard, 59 Ill. 46 - - 264
O'Conner v. Hartford F. Ins. Co. 31 W. 165 - - - 520
Olinger v. Liddle, 55 W. 621 - 223
O'Neill v. Bradford, 1 Pin. 390 19

Paine v. Fulton, 34 W. 83 676-7
——— v. Gill, 13 W. 561 - 106
——— v. Woodworth, 15 W. 298 - - - - - 92, 106
Palmer v. Hussey, 119 U. S. 96 595, 598, 600
——— v. Hutchinson, 6 App. Cas. 619; 34 Eng. (Moak), 666 - - - - - - 363
Parish v. Eden, 62 W. 272 - 55
Payne v. Gardiner, 29 N. Y. 146 - - - - - - 21
——— v. Wilson, 74 N. Y. 348 96
Pearson v. Pearson, L. R. 27 Ch. Div. 145 - - - 439
Peck v. School Dist. 21 W. 516 550
People v. Herkimer, 4 Cow. 345; 15 Am. Dec. 379 - - 363
——— v. St. Louis, 5 Gilman, 367 - - - - - - 172
People *ex rel.* Trainer v. Cooper, 8 How. Pr. 288 - 254
Pepper v. O'Dowd, 39 W. 548 320

Digitized by Google

Perine v. Dunn, 4 Johns. Ch. 140 - - - - - 254
Peyser v. Mayor, 70 N. Y. 497 661
Phillips v. Albany, 28 W. 340 551
Pickman v. Trinity Church, 123 Mass. 1 - - - - 435
Pier v. Prouty, 67 W. 218 14, 15
Pike v. Vaughn, 39 W. 500 - 676
Pilling v. Otis, 13 W. 495 - 464
Pillsbury v. Mitchell, 5 W. 17 634
Pitcher v. Livingston, 4 Johns. 1 - - - - - 649
Pool v. Boston, 5 Cush. 219 - 389
Poorman v. Mills, 35 Cal. 118 21
Potter v. C. & N. W. R. Co. 20 W. 533 - - - - 618
Potts v. Cooley, 51 W. 353 15, 494
Powell v. Jessopp, 18 C. B. 336 352
Powers v. C. H. Hamilton Paper Co. 60 W. 23 - - 239
Pratt v. Peck, 65 W. 463 - 676
Preston v. Bacon, 4 Conn. 471 389
Putnam v. French, 53 Vt. 402 467

Quaife v. C. & N. W. R. Co. 48 W. 513 - - - - - 57
Quaw v. Lameraux, 36 W. 626 253
Queen v. Ruscoe, 8 Adol. & E. 386 - - - - - - 423
——— v. Stroulger, L. R. 17 Q. B. Div. 327 - - - - 423
Quinlan v. Pierce, 34 W. 304 30

Railroad Co. v. Gladmon, 15 Wall. 401 - - - - - 527
——— v. Stout, 17 Wall. 657 276
——— v. Trimble, 10 Wall. 379 - - - - - - - 80
Ramsay v. Hommel, 68 W. 12 134
Randall v. N. W. Tel. Co. 54 W. 140 - - - 54, 527
Ray v. Northrup, 55 W. 396 - 70
Raynor v. State, 62 W. 289 - 164
Rector v. Drury, 3 Pin. 298 - 286
Redman v. Ætna Ins. Co. 49 W. 438 - - - - - 268
Redmon v. Phœnix F. Ins. Co. 51 W. 302 - - - - 105
Rees v. Ludington, 13 W. 276 92
Reilly v. Franklin Ins. Co. 43 W. 449 - - - - - 516
Reynolds v. Vilas, 8 W. 471 - 644
Rich v. Johnson, 2 Pin. 88 328, 644
Richardson v. Chynoweth, 26 W. 656 - - - - - 330
Riggs v. Weise, 24 W. 545 - 23
Roebke v. Andrews, 26 W. 311 - - - - - 33, 464
Rogan v. Walker, 1 W. 527 - 267
Rogers v. Brightman, 10 W. 65 - - - - - - 357
Rolland v. Comm. 82 Pa. St. 325 - - - - - - 419
Rood v. Am. Exp. Co. 46 W. 639 - - - - - - 683
Root v. Bonnema, 22 W. 539 622
Rowe v. Granite Bridge Corp. 21 Pick. 344 - - - - 173
Russell v. Lennon, 39 W. 570 445
——— v. M. & St. L. R. Co. 32 Minn. 230 - - - 528

Sage v. McLaughlin, 34 W. 550 - - - - - - 671
Sarbecker v. State, 65 W. 171 545
Sauntry v. Dunlap, 12 W. 404 354
Savings Bank v. Sargent, 20 Kan. 576 - - - - - 239
Sawyer v. Birchmore, 3 Mylne & K. 572 - - - - 584
Scanlan v. Childs, 33 W. 663 538, 541-3, 545
Schenck v. Warner, 37 Barb. 258 - - - - - - 149
Schettler v. Jones, 20 W. 412 23, 24
Schobacher v. Germantown F. M. Ins. Co. 59 W. 86 68, 255
Schroth v. Prescott, 63 W. 652 679, 681
Schultz v. C., M. & St. P. R. Co. 48 W. 375 - - - 526
Schuyler v. Russ, 2 Caines, 202 - - - - - - 435
Schweitzer v. Connor, 57 W. 177 - - - - - - 489
Scott v. Clayton, 51 W. 185 - 195
——— v. ———, 54 W. 499 - 195
——— v. London & St. K. Docks Co. 3 Hurl. & C. 596 189
——— v. M. U. & W. G. R. Co. 86 N. Y. 200 - - - 43
——— v. Seaver, 52 W. 175 - 501
Seaman v. Ascherman, 51 W. 678 - - - - - - 80
——— v. ———, 57 W. 547 - 80
——— v. Burnham, 57 W. 568 410
Seefeld v. C., M. & St. P. R. Co. 67 W. 96 - - - 537
Selz v. First Nat. Bank, 60 W. 246 - - - - - - 255
Sheel v. Appleton, 49 W. 125 681
Shepard v. Mil. G. L. Co. 15 W. 318 - - - 330, 334-5
Shephard v. Little, 14 Johns, 210 - - - - - - 38
Sheridan v. Ireland, 66 Me. 65 110

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Sherman v. Champlain Tr. Co. 31 Vt. 162 - - - 357
Shirley v. Watts, 3 Atk. 200 655
Single v. Barnard, 29 W. 463 622
Slemmer's Appeal, 58 Pa. St. 155 - - - - - 81, 88
Sloan v. Anderson, 57 W. 124 661
Smalley v. Greene, 52 Iowa, 241 - - - - - - 442
Smith v. Briggs, 64 W. 497 - 363
——— v. C., M. & St. P. R. Co. 42 W. 520 - - - 526
——— v. Dragert, 61 W. 223 410
——— v. Finch, 8 W. 245 - 368
——— v. Hart, 44 W. 230 - 247
——— v. Hughes, 50 W. 620 644
——— v. Morgan, 68 W. 358 489
——— v. Rumsey, 33 Mich. 183 - - - - - - 398
——— v. Sherry, 54 W. 114 - 488
——— v. Smith, 51 W. 668 - 70
——— v. Stoller, 26 W. 671 - 676
——— v. Tracy, 36 N. Y. 82 467
———, Will of, 52 W. 543 - 380
——— v. Wunderlich, 70 Ill. 426 - - - - - - 334
Snyder v. W. U. R. Co. 25 W. 60 - - - - - - - 183
——— v. Wolford, 33 Minn. 175 - - - - - - 354
Spearbracker v. Larrabee, 64 W. 578 - - - - - - 528
Speiglemyer v. Crawford, 6 Paige, 254 - - - - - 398
Spenceley v. Schulenburgh, 7 East, 357 - - - - 584
Spofford v. True, 33 Me. 284 107
Springer's Adm'rs v. Springer, 43 Pa. St. 518 - - - 398
Spurr v. Andrew, 6 Allen, 420 - - - - 638, 640
Staats v. Ten Eyck, 3 Caines, 111 - - - - 644, 649
Stansfield, *Re*, 16 N. B. R. 268 - - - - - - 597
State v. Castle, 44 W. 670 - 494
——— v. Ingersoll, 17 W. 631 144
——— v. Kane, 63 W. 260 420, 422
——— v. Mansfield, 23 N. J. Law, 510; 57 Am. Dec. 409 246
——— v. McCall, 4 Ala. 643; 39 Am. Dec. 314 - - - 422
——— v. Nett, 50 W. 524 - 453
——— v. Parish, 43 W. 395 - 404
——— v. Parker, 16 Nev. 79 424
——— v. Smith, 75 N. C. 306 535
——— v. Wilson, 1 N. J. Law, 439; 1 Am. Dec. 216 - - 422
State *ex rel.* Priest v. Regents, 54 W. 170 - - - - - 246
Stearns v. Raymond, 26 W. 74 - - - - - - 622
Stebbins v. Eddy, 4 Mason, 417 435
Stevens v. Clark Co. 43 W. 41 72
Steward v. Blakeway, L. R. 4 Ch. App. 603 - - - 353
Stewart v. McSweeney, 14 W. 468 - - - - - - 30
Sturges v. Allis, 10 Wend. 355 661
Sutton v. Chapman, 64 W. 312 661
Swineford v. Pomeroy, 16 W. 553 - - - - - - 381
Sydnor v. Palmer, 29 W. 252 321
——— v. ———, 32 W. 406 - 144

Taggard v. Buckmore, 42 Me. 81 - - - - - - - 104
Tarbell v. Bowman, 103 Mass. 343 - - - - - - 435
Taylor v. Robinson, 14 Cal. 401 656
——— v. Woburn, 130 Mass. 494 - - - - - - - 55
Thomas v. Mitchell, 27 W. 414 194
——— v. Thomas, 41 W. 229 308
Thomas, B. & W. Mfg. Co. v. W., St. L. & P. R. Co. 62 W. 642 - - - - - - 330
Thompson v. St. L. Ins. Co. 43 W. 462 - - - - - 516
——— v. Schermerhorn, 6 N. Y. 92; 55 Am. Dec. 385 - 246
Thrall v. Thrall, 60 W. 503 - 30
Townsend v. Whitney, 75 N. Y. 425 - - - - - - 398
Tracey v. Sacket, 1 Ohio St. 54 - - - - - - - 264
Treat v. Hiles, 68 W. 344 - 441
Tripp v. Curtenius, 36 Mich. 496 - - - - - - 21
Tucker v. Finch, 66 W. 17 - 584
——— v. Henniker, 41 N. H. 317 - - - - - - - 535
Tuttle v. Wilson, 52 W. 643 - 488

Union Nat. Bank v. Benjamin, 61 W. 514 - - - - - 70
U. S. v. Herron, 20 Wall. 251 363
Upton v. Suffolk Co. Mills, 11 Cush. 586; 59 Am. Dec. 163 467
Urquhart v. Wescott, 63 W. 135 - - - - - - 134

Vandyne's Ex'rs v. Vanness, 5 N. J. Eq. 485 - - - 109
Vicksburg & M. R. Co. v. Putnam, 118 U. S. 554 - - 59

Digitized by Google

Villers v. Beamont, 2 Dyer, 146 - - - - - - 38
Vincent, *Ex parte*, 26 Ala. 145; 62 Am. Dec. 714 - - 423

Waddle v. Morrill, 26 W. 611 128
Wadleigh v. Merkle, 57 W. 517 - - - - - - 501
Walker v. Bartlett, 18 C. B. 845 - - - - - - 352
Wallingford v. Burr, 17 Neb. 137 - - - - - - 439
Walsh v. C., M. & St. P. R. Co. 42 W. 30 - - - - 330
Ward v. Smith, 11 Price, 19 335
Warner v. Fountain, 28 W. 405 - - - - - - 30
——— v. P. M. & F. Ins. Co. 14 W. 318 - - - - - 520
Warren v. Bean, 6 W. 120 - 268
——— v. Putnam, 63 W. 410 484, 489
Washburn v. Mil. & L. W. R. Co. 59 W. 364 - - - - 537
Watson v. Spratley, 10 Exch. 222 - - - - - - 352
Webb v. Meloy, 32 W. 319 - 671
——— v. Sharp, 13 Wall. 14 94
Webber v. Quaw, 46 W. 122 488
Webster v. Moe, 35 W. 79 - 488
——— v. Phœnix Ins. Co. 36 W. 67 - - - - . - 302
Wedgwood v. C. & N. W. R. Co. 41 W. 478 - - - - 526
Weis v. Schoerner, 53 W. 72 671
Weisenberg v. Appleton, 26 W. 56 - - - - - - 464
Welch v. Porter, 63 Ala. 232 109
Wells v. Horton, 4 Bing. 40 357
Werely v. Persons, 28 N. Y. 344 - - - - - - 57
Western Ass. Co. v. Towle, 65 W. 254 - - - - - 626

Wheeler v. Westport, 30 W. 392 - - - - - - 528
Whelen's Appeal, 108 Pa. St. 162 - - - - - - 246
Whereatt v. Ellis, 58 W. 625 68
——— v. ———, 65 W. 639 - 68
White v. Chouteau, 10 Barb. 202 - - - - - - 149
——— v. Crawford, 9 Fed. Rep. 371 - - - - - 601
Whiting v. Barney, 30 N. Y. 330 - - - - - - 585
——— v. Graves, 3 Ban. & A. 222 - - - - - 84, 85
——— v. S. & F. du L. R. Co. 25 W. 167 - - - 550, 552
Wicke v. Lake, 21 W. 410 - 30
——— v. ———, 25 W. 71 - 30
Wilde v. Paschen, 67 W. 90 - 576
Wilkens v. Spafford, 3 Ban. & A. 274 - - - 80, 81, 87
Wilkinson v. Scott, 17 Mass. 249 - - - - - - 39
Willard v. Comstock, 58 W. 565 - - - - - - 552
——— v. Rice, 45 Am. Dec. 226 622
Willer v. Bergenthal, 50 W. 474 - - - - - 105, 213
Williams v. Sexton, 19 W. 42 343
——— v. State, 61 W. 290 424
Wilson v. Godlove, 34 Mo. 337 585
Winner v. Hoyt, 66 W. 227 - 284
——— v. ———, 68 W. 278 294–6, 298
Wis. R. Imp. Co. v. Lyons, 30 W. 61 - - - - - - 194
Wright v. E. E. Bolles W. W. Co. 50 W. 169 - - - 488
Wyman v. Buckstaff, 24 W. 477 - - - - - - 252

Young v. Lynch, 66 W. 514 618

Zwickey v. Haney, 63 W. 464 69

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CASES DETERMINED

AT THE

January Term, 1887.

GAVENEY and another, Respondents, vs. GATES, Appellant.

December 21, 1886 — January 11, 1887.

Sale of chattels: Contract construed.

The contract between the parties herein, made by numerous letters, is *held* to have been that shingles shipped by the defendant to the plaintiffs were not sold to the latter for what they could "afford to pay," but were *to be sold by them* and the net proceeds of the sales applied in payment for flour sent by them to the defendant.

APPEAL from the Circuit Court for *Clark* County.

The facts will sufficiently appear from the opinion. There was a verdict for the plaintiffs for $151.05, and from the judgment entered thereon the defendant appealed.

R. J. MacBride, for the appellant.

For the respondents there was a brief by *Ring & Youmans*, and oral argument by *Mr. Ring*.

ORTON, J. The respondents brought this suit against the appellant to recover the sum of $475, the sum agreed to be paid for the sale and delivery of 100 barrels of flour. The defendant pleaded payment and a counterclaim of $355 as the value of 355,000 shingles sold and delivered to the plaintiffs. The plaintiffs in their complaint admit payment on said flour of $150, and that the defendant "is entitled to a further credit thereon of $71, for and account of three

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car-loads of shingles voluntarily shipped by the defendant to the plaintiffs in October, 1883, to be disposed of by them, and credited to him at twenty cents per thousand, or such price as they could afford to allow him, which plaintiffs aver is the sum of twenty cents per thousand."

What the contract between the parties was as to the shingles was educed from the following correspondence between them: (1) From the defendant to the plaintiffs, September 20, 1883: "I am going to send you a car-load of shingles, and will take whatever you think right, and will take it in flour, feed, or anything else, any time this fall or winter. Would like to send you two or three car-loads, but dare not be so bold, and will only send one car until I hear from you." (2) From plaintiffs to defendant, September 22d: "Your postal of yesterday is received. Send the car of shingles, and *we will sell them.* There seems to be quite a demand just now. We will try and *sell yours* all the time, providing the condition is right." (3) From defendant to plaintiffs, September 26th: "I have sent you one car of No. 1 shingles. Do the best you can. That will satisfy me. If you can't afford to pay a dollar besides the freight, less will do. I am going to send you another car soon." (4) From the same to the same, September 27th: "I send you two cars No. 1 shingles. 101½ thousand, 128,000–229,000, which I hope to get a dollar a thousand, net; but do the best you can and I will be satisfied." (5) From the same to the same, October 1st: "I have already sent you three car-loads of No. 1 shingles, and perhaps this will be too many, but do the best you can, and if you say so I will ship you a car of better shingles. I thought, at a dollar besides the freight, those No. 1 shingles would sell like hot cakes." (6) From plaintiffs to defendant, October 1st: "We did not intend to have you send more than one car of No. 1 shingles, but wanted a car of better quality. Wakefield & Trow sell at Merrillan, No. 1,

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at 80 cents or 85 cents, and freight from there, is only $15 per car, while on yours it is $24 per car. We will try to have the other yard take a part of them, but if it does it would want them on as favorable terms as shingles can be purchased elsewhere." (7) From defendant to plaintiffs, October 1st: "Yours of October 1st is received. I don't want you to pay any more than you can afford to, if it ain't but twenty cents per thousand I shall not blame you. They are not such shingles, however, as Wakefield & Trow sell at 90 cents. Such shingles as he sells at that we offer at 75 cents. But do the best you can, and I will not ship you any more until you order." (8) From plaintiffs to defendant, October 7th: After unimportant preliminaries, and stating that Trow's shingles are as good as his, and the freight less, they say: "We are willing to do what we can to help you out on these shingles, but it looks as though it will take at least two years to dispose of them here. *After realizing our freights, we* will credit you with sales, as we have not money enough in our business so that we can afford to lock up so much. We will ship you fifty barrels of flour as soon as we can get wheat enough to make them, but very little is coming to market now." (9) From defendant to plaintiffs, October 10th: "Please ship us 50 barrels of flour as soon as you can; and about the shingles, do the best you can *out of them* and that is all I want. I will not ask you for any money *out of them*, and don't want you to pay any more than you can buy the same kind at, and want you to have all the time you want to pay for them." (10) From same to the same, October 12th: After informing the plaintiffs that one Lockway had repeatedly written and telegraphed to him that he would send him the money for the shingles the plaintiffs had in their hands, he says: "I would rather you would take care of the shingles. If there is so much money there, and he has plenty of it, let him pay it to you, *as that would pay both of us* and suit me

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better; and what I want you to do is *to sell the shingles if you can, and let me lose what there is to be lost*, as you are not in any way to blame for the shipment. I do not know Mr. Lockway, and I would not think of taking the shingles *out of your hands* unless you wanted me to and he paid for the same. *Any disposition* you make of the shingles will be satisfactory." (11) From plaintiffs to defendant, October 15th: After saying that they had tried to sell the third car-load of shingles to one Hotchkiss, who kept another lumber yard, and had offered a car-load to Lockway for one dollar per thousand and freight, they say further: "We will let him have, say, 100,000 or more of your shingles at, say, $1 per thousand and freight, *and pay you all he pays*, the freight to apply on the other shingles. . . . Name the price and freight, and we will deliver the shingles to him on payment of the money, *and remit the same to you.* If he is going into the shingle trade, which I think is doubtful, we would rather he had them of you than anywhere else."

These are all the letters or postal cards which throw any light upon the contract. The proposition of the defendant is contained in the first letter. He wished to send the plaintiffs a car-load of shingles, and take in exchange for it flour or feed, etc., at any time that fall or winter. The second letter is an acceptance of the proposition: "Send the car of shingles, and *we will sell them*," etc. This made the first contract between the parties. A car-load of shingles was to be sent to the plaintiffs *to sell* for the defendant, and the proceeds to be applied upon flour and feed which the defendant was to have that fall or winter from the plaintiffs. The third letter shows only a compliance on the part of the defendant of this contract: "I have sent you one car No. 1 shingles. Do the best you can. That will satisfy me. If you can't afford to pay a dollar besides the freight, less will do." The first car-load is thus disposed of. As to that there can be no doubt that the plaintiffs were to sell the

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shingles for what they could reasonably obtain. This letter contains another proposition: "I am going to send you another car soon." The fourth letter is a notification by the defendant to the plaintiffs that he had sent to them two more car-loads of No. 1 shingles. "I send you two cars No. 1 shingles, 229,000, which I hope to get a dollar a thousand, net; but do the best you can and I will be satisfied." The fifth letter is a repetition of the others, and a summing up of the shingles sent. "I have already sent you three car-loads of No. 1 shingles, and perhaps this will be too many, but do the best you can. I thought, at a dollar besides the freight, those No. 1 shingles *would sell* like hot cakes." This is another proposition, fulfilled on the part of the defendant before its acceptance by the plaintiffs. But what is this proposition? It is most clearly that the two other car-loads were sent by the defendant to the plaintiffs, to be sold by them for what they could reasonably obtain, and that the proceeds should be applied on the feed or flour that the defendant was to have from the plaintiffs that fall or winter, the same as the first. No other terms or conditions are expressed or contemplated. In the sixth letter the plaintiffs complain that the defendant had sent the two other car-loads, and expressed doubt about their ability to sell them at a dollar per thousand. "We did not intend to have you send more than one car of No. 1 shingles." In the seventh letter the defendant attempts to allay the anxiety or fear of the plaintiffs, in respect to the price for which they might be able to sell the shingles, and he says: "I don't want you to pay more than you can afford to, if it ain't but twenty cents per thousand I shall not blame you. . . . Do the best you can, and I will not ship any more until you order."

Thus far there has been no acceptance by the plaintiffs of the proposition of the defendant, or its terms, that he had sent them two more car-loads of shingles *to be sold by them*

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for what they could reasonably obtain, to be applied upon flour or feed that he might have of them during the fall or winter. Besides the acceptance of the proposition reasonably implied by the delivery of 100 barrels of flour of value supposed to be nearly equivalent to the proceeds of the three car-loads of shingles sold and to be sold by them, the plaintiffs made their formal acceptance by letter of the terms of the proposition: (8) From the plaintiffs to the defendant, October 7th, 1883: After speaking of the unfavorable chances of making sales of the shingles at the price supposed to be reasonable by the defendant, the plaintiffs say in this letter: "We are willing to do what we can to help you out on these shingles, but it looks to us as though it will take at least two years *to dispose of them* here. *After realizing our freights, we will credit you with sales*, as we have not money enough in our business so that we can afford to lock up so much." The ninth and tenth letters from the defendant to the plaintiffs of the 10th and 12th of October make no change in the above terms. The first asks for fifty barrels of flour, and says: "About the shingles, do the best you can *out of them* and that is all I want. I will not ask you for any money *out of them*, and don't want you to pay any more than you can buy the same kind at, and want you to have all the time you want to pay for them." The second speaks of Lockway wishing to purchase some of these shingles directly from him, and of his refusal, and of his referring him to the plaintiffs for that purpose, and says: "I trust, and I would rather you would take care of the shingles. . . . Let him [Lockway] pay it to you, *as that would pay both of us* and suit me better; and what I want you to do is *to sell the shingles if you can, and let me lose what there is to be lost*, as you are not in any way to blame for the shipment. . . . Any disposition you make of the shingles will be satisfactory." The eleventh letter and the last one having any bearing

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upon the terms of the contract, is from the plaintiffs to the defendant, dated October 15th. In this letter the plaintiffs speak of their efforts to sell Lockway a large bill of the shingles for one dollar per thousand and freight, and ask the defendant to refer him to them; and they close by saying: "I think we understand each other perfectly."

We cannot but think that the true and fair construction of the language of these mutual letters, from which the terms of the contract between the parties are to be derived, is that the defendant sent the shingles to the plaintiffs to sell at the best price they could reasonably obtain, and account for the proceeds, deducting the freight and expenses of selling, and apply them in payment for any flour or feed which the defendant might have had of them. The defendant, under this contract, obtained from the plaintiffs 100 barrels of flour, at the rate of $4.75 per barrel, and the plaintiffs have had of the defendant 355,000 of No. 1 shingles to sell for him, and which they have sold and received the purchase price thereof in money, and paid thereon about $72 freight, to be deducted therefrom.

It is true that the counterclaim of the answer, after an allegation of payment, goes upon a *quantum meruit*. But this is not inconsistent with the contract; for the best and fairest criterion of what the shingles were reasonably worth and of their market value is what the plaintiffs sold them for in market, so far as *they* are concerned. If the plaintiffs had sold these shingles at 50 cents per thousand, using reasonable care and diligence, and could not have gone into the market and purchased shingles of the same quality for less than one dollar per thousand, they would have thought it a great hardship, under this contract, to be compelled to account to the defendant for the price last named. And so if the plaintiffs had watched the chances of the market, and found some person who, under the stress of circumstances, would be willing to sell them shingles of a similar quality

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for fifty cents per thousand, when they had actually sold these shingles at a dollar per thousand, the defendant, if compelled to receive for them the price at which under such or any circumstances the plaintiffs might have supplied themselves with such shingles, might justly complain. In both of these cases these shingles would be submitted to the uncertain and contradictory evidence of quality and comparative and market value, which would very likely work injustice to one or the other of the parties. But it is sufficient that there is nothing in the contract of the parties. as determined by their correspondence, that would lead to any such unfair presumption. Every circumstance and condition of things about this transaction of barter or exchange of flour for shingles repels any such presumption. The price of the flour was fixed and undisputed, and bills thereof rendered. But as to the shingles, no price was fixed or ever claimed by the parties, and the shingles were consigned to the plaintiffs at their place and market, distant from that of the defendant as consignor; and about the market value of shingles at that place the plaintiffs may be presumed to have had superior knowledge, and would have had the better judgment, and yet they made no certain offer of any price they were willing to pay, and never said a single word about market value or the price at which they could have supplied themselves with the same article. On the other hand, they were all the time consistent in saying to the defendant: "Send the shingles and we *will sell them.*" "We will try and *sell* yours all the time." "After realizing our freights, we will *credit you with sales,*" etc., and other similar statements. This made a *certain* criterion of adjustment, and one perfectly fair and equitable to both parties. The circumstances confirm what would appear to be the clear and indisputable terms of the contract. It is significant that the plaintiffs allege in their complaint "that the defendant voluntarily shipped to them the shingles, *to be*

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disposed of by them and credited to him at twenty cents per thousand."

We have occupied so much space, and perhaps too much and unnecessarily, in order to ascertain what the contract between the parties in relation to the shingles really was, as that is the only question in the case. The learned judge before whom the case was tried, instructed the jury as follows: "There is no dispute what they agreed to. The agreement was that the plaintiffs should allow the defendant for the shingles *what they thought* they could afford to." "They are to pay what they can afford to pay, or, which amounts to the same thing, whatever they could get the same class of shingles for elsewhere and get them delivered at Independence." "I think that is the only question for you to determine,— is what they could have supplied themselves with the same grade of shingles for from other places." The learned judge, probably from memory, slightly misquotes an expression in one of the defendant's letters in support of the above instructions. There is language something similar in one of his letters, but following the language, "and about the shingles, do the best you can *out of them* and that is all I want," and that letter is an answer to one from the plaintiffs saying that "after realizing our freights we will credit you with sales." The plaintiffs never assented to any other terms than to account for sales of the shingles. Any expressions in the defendant's letters which have been made the subject of argument as showing the consignment or delivery of the shingles on any other terms, are easily explained by the fact that the plaintiffs were all the time troubled about what they could get for the shingles, and complained of the lowness of the market for such shingles, evidently in order to satisfy the defendant if they should be compelled to sell the shingles for less than one dollar a thousand and freight, the price which the defendant was insisting they ought to bring; and the defend-

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ant repeated, "do the best you can." "I don't want any more;" and claimed that the shingles which were selling for less than one dollar per thousand were of inferior quality to his, and that he did not want any more than shingles of the *same quality* as his shingles could be purchased for in that market, and *that* price he encouraged the plaintiffs to think they would be able to obtain in proper time, and he was willing that they should have all the time they wanted to sell them in, even two years.

One Lockway, a witness for the defendant, was asked: "Do you know what *Gaveney & Comstock* sold these particular shingles for at Independence that year?" (two or three years before.) This question was objected to by the plaintiffs' counsel, and the objection sustained. One of the plaintiffs, *Comstock*, on cross-examination as a witness, was asked by the defendant's counsel: "What did you sell these No. 1 shingles for in the month of October, 1883,—how much a thousand?" The objection of the plaintiffs' counsel to this question was sustained. "Did you sell these same No. 1 shingles in Trempealeau county, Independence, for $1.60 a thousand?" "Will you state to the jury how much you realized from the sales of these 355,000 shingles shipped to you by *J. L. Gates* in September and October, 1883, over and above the cost of freight and other expenses in handling and disposing of them?" These two questions were asked, with the same ruling. It may be as well to say here that we think that, according to the terms of the agreement, the last question asked forms the basis of the proper adjustment of the defendant's claim for the shingles and the correct criterion of determining the amount. These rulings of the court in respect to the evidence, and the above instruction to the jury, make clear the view of the circuit court as to what was deemed the correct construction of the contract, and we think they were clearly and radically erroneous.

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The testimony on the trial, in respect to the market value of No. 1 shingles, and the quality of the defendant's shingles in fact, and in comparison with the shingles of other persons at Independence and elsewhere, was, as might have been anticipated, in wide and irreconcilable conflict and contradiction. The jury were left to spell, if not to guess, out a just verdict from such uncertain evidence, by such an uncertain criterion. In such a case an approximation to a just verdict would be a matter of mere chance, when the contract has furnished the only certain, fair, and reasonable basis for the adjustment of the defendant's claim and the plaintiffs' liability. The plaintiffs have sold all of the shingles for cash at some price, no matter what if the sale was fair and honest, and the most just and reasonable thing for them to do is to account for such sales, deduct the freight and their expenses, and credit the balance on the flour. Why not? This, at least, would be carrying out the contract as we understand it, and this they should do.

Besides the errors above considered, the circuit court erred in allowing the following questions to be asked by the plaintiffs' counsel of one of the plaintiffs as a witness, against the objection of the defendant's counsel: "Tell the jury what you could have purchased, from other sources, No. 1 shingles that would have sold for the same price," etc. "What amount can you reasonably afford to credit to *Mr. Gates* on account of these shingles? How much per thousand?" "State what you could afford to pay, and how you arrive at it." The first question involves the necessity of ascertaining the price at which the shingles were sold as "the same price" mentioned therein, when all evidence as to the price at which they were sold was excluded. The witness answered that "he could have got them delivered at Independence for 75 cents a thousand, free of all charges," and that "75 cents a thousand is the

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highest amount we could afford to allow *Mr. Gates*," etc. The court instructed the jury that the plaintiffs were to pay what they could afford to pay, and "*what they thought*" they could afford to pay, and that such was the contract. The witness stated what they thought they could afford to pay, and so the case was foreclosed; and the jury might take that as the rate, and they probably did, and deducted the freight from the 75 cents per thousand, and found that that was all the plaintiffs could afford to pay. What they could afford to pay was what they sold the shingles for, deducting freight and expenses, and this was what the circuit court should have ruled.

We have given more space to the consideration of this case on account of the importance of the question involved, and out of deference to the candid and able counsel of the respondents and to the learned judge before whom the case was tried, who honestly entertained a different view of the contract than the one above expressed.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

RAMSAY, Respondent, vs. HOMMEL, Appellant.

December 21, 1886 — January 11, 1887.

Tax titles: Proof of publishing and posting notice of sale: Limitation of actions.

1. An affidavit of the publisher of a newspaper, made May 7, 1880, that the notice of a tax sale "was published in said newspaper for the period of five weeks, commencing on the 9th day of April, 1880," does not show that it was published *once in each week for four successive weeks*, as required by sec. 1130, R. S.
2. An affidavit of the posting of the notice of a tax sale in four specified places, "the same being four public places in the village of

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Neillsville," etc., does not show that it was posted in four public places in the *county*, within the meaning of sec. 1130, R. S.

3. The limitation of sec. 3, ch. 309, Laws of 1880, is available only as to errors or defects going to the validity of the assessment and affecting the groundwork of the tax.

APPEAL from the Circuit Court for *Clark* County.

The case is thus stated by Mr. Justice CASSODAY:

"The plaintiff in this action of ejectment, commenced May 24, 1883, claims title to the premises in question under three tax deeds,—one executed and recorded January 23–24, 1877; one May 12–13, 1880, on sale of 1877; one May 29, 1882, on sale of 1879. The defendant answered by way of a general denial and a claim of being the owner in fee in possession; and relied upon a tax deed regular upon its face, executed to him and recorded May 14, 1883, on the tax sale of 1880 for the tax of 1879.

"On the trial, September 8, 1884, the court directed a special verdict for the plaintiff, subject to the opinion of the court on questions of law involved. November 28, 1885, the court, having considered such questions of law, ordered, in effect, that judgment be entered in favor of the plaintiff and against the defendant on the verdict and in accordance therewith; but upon the condition that such order should be void and of no effect unless the plaintiff, within ninety days from that date, paid to the defendant the amount for taxes and interest his due thereon, which amount was tendered by the plaintiff within the time; and thereafter, and January 8, 1886, judgment was entered upon said verdict in favor of the plaintiff and against the defendant in pursuance of said order; from which judgment the defendant appeals."

For the appellant there was a brief by *B. F. French* and *Ring & Youmans*, and an oral argument by *Mr. Ring*.

R. J. MacBride, for the respondent, to the point that proof that a notice was published for thirty days commencing at a named date is not sufficient to show compliance with a

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statutory requirement that such notice shall be published once a week for four weeks, cited *Prince George Co. v. Clarke*, 36 Md. 206; *Nelson v. Pierce*, 6 N. H. 194; *Magruder v. Esmay*, 35 Ohio St. 221; *City R. Co. v. Chesney*, 30 Kan. 199; *Eaton v. Lyman*, 33 Wis. 34; 2 Desty on Taxation, 836.

CASSODAY, J. It is conceded that the plaintiff has a perfect title to the land in question, unless it is cut off by the tax deed issued to the defendant. The sale upon which the deed was issued occurred subsequently to the enactment of chapters 305, 309, Laws of 1880, and, of course, is subject to their provisions. The limitation of one year prescribed by sec. 3, ch. 309, Laws of 1880, even had it been pleaded, would only have been available to the defendant as to such errors or defects, if any, as went to the validity of the assessment and affected the groundwork of the tax. *Pier v. Prouty*, 67 Wis. 218.

Among the irregularities here complained of is that the affidavit of the publisher and the printer of the newspaper in which the statement and the notice of sale was published, was sworn to May 7, 1880, and simply stated that the notice "was published in said newspaper for the period of five weeks, commencing on the 9th day of April, A. D. 1880." This covered a period of just twenty-eight days. The statutory requirement was that such "statement and notice shall in all cases be published *once in each week*, for four *successive* weeks prior to" the sale. Sec. 1130, R. S. Manifestly, the affidavit failed to show that the statement and notice were published once in each week during the time. The right to sell at all depended in part upon the compliance with this section.

This section also required, in effect, that the treasurer should, at least *four* weeks previous to the day of sale, cause to be posted up copies of said statement and notice in at

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least four public places in such *county*, one of which copies was to be posted up in some conspicuous place in his office. Here the affidavit of the deputy county treasurer was to the effect that he did, April 10, 1880, post up said statement and notice "in the following places, to wit: One copy in a conspicuous place in the county treasurer's office; one copy in a conspicuous place in the post-office; one copy in a conspicuous place in the office of the O'Neil House; one copy in a conspicuous place in the office of the Rosman House,—the same being four public places in the village of Neillsville," etc. That affidavit was sworn to April 12, 1880. From this it appears that such posting up of the notice was not only one day short, but, as indicated in *Hilgers v. Quinney*, 51 Wis. 70, 71, is open to the objection that, while the three places named outside of the treasurer's office may have been public places so far as the village was concerned, they were not necessarily public places so far as the whole county was concerned, within the meaning of the statute. As there said, the statute "is mandatory and imperative." Being in derogation of the common law, it must be strictly pursued, or the title of the lawful owner will not be divested and transferred to another. *Potts v. Cooley*, 51 Wis. 355. The treasurer was required to carefully preserve the proofs of the compliance with the requirements of the section in the particulars named, and deposit the same in the office of the county clerk, to be filed and preserved therein. Secs. 1132, 1141, R. S.

These irregularities in the sale were sufficient to avoid the tax deed issued to the defendant thereon. As they did not go to the validity of the assessment and affect the groundwork of the tax, they were not cured by the limitation of ch. 309, Laws of 1880. *Pier v. Prouty*, *supra*. This being so, and the plaintiff having failed to show affirmatively that the land was not liable to taxation, or that the taxes had been paid or the land redeemed, the trial court properly

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ordered the plaintiff to repay the amount paid, with interest, less the damages awarded, as provided, as a condition precedent to entering judgment against the defendant. Sec. 3087, R. S.; ch. 305, Laws of 1880. The plaintiff having made such payment, or rather tendered the same, which we presume has been kept good, the plaintiff was entitled to judgment.

By the Court.—The judgment of the circuit court is affirmed.

CURRAN, Administrator, etc., Respondent, vs. WITTER, Appellant.

December 21, 1886 — January 11, 1887.

(1, 2) Certificates of deposit: Limitations of actions: When statute begins to run. (3) Limitation in case of death. (4) Evidence: Memoranda: Entries in account books.

1. A certificate of deposit issued by a banker in the ordinary form of such instruments is, in substance and legal effect, a negotiable promissory note.
2. The statute of limitations begins to run against a certificate of deposit issued by a banker, from the date of its issuance, although no demand of payment is made.
3. Sec. 4234, R. S., providing that "if a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representative after the expiration of that time, and within one year from his death," applies only where the person entitled to bring the action dies during the last year of the term of limitation.
4. A witness may properly testify that entries made by him in a book of account are correct, although he has no independent recollection of the transactions thus entered.

APPEAL from the Circuit Court for *Wood* County.

In the year 1869 the defendant carried on the business of banking at Grand Rapids in this state. In October of that

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year, James Curran, plaintiff's intestate, deposited with him $540, and received therefor the following certificate, written and signed by one Moody, the defendant's clerk:

"J. D. WITTER, BANKER, GRAND RAPIDS, WISCONSIN.

"$540. OCTOBER 6, 1869.

"Mr. James Curran has deposited in this bank five hundred and forty dollars, payable to his order on the return of this certificate properly indorsed.

"J. D. WITTER.
"Per MOODY."

James Curran died in 1872 intestate, and in 1885 the plaintiff was appointed and duly qualified as administrator of his estate. In August, 1885, he brought this action upon such certificate of deposit. The defendant answered payment, and the six and twelve years statutes of limitation contained in secs. 4222, 4251, R. S. He also interposed a counterclaim for $540, and alleged therein that the amount so deposited with him by James Curran, and for which the certificate was issued, was by his clerk entered to the credit of Curran in the general account-books of the plaintiff, and, between October 6th (the date of the transactions) and the 10th of the same month, was paid to Curran together with other sums deposited by him, and his account was thereupon balanced and closed; and that, through negligence and mistake of Moody, the certificate of deposit in suit was not taken up or canceled or any evidence that it was paid indorsed thereon.

On the trial the defendant offered in evidence the deposition of E. N. Moody, the defendant's clerk before mentioned, in which he gave testimony tending to show that he kept the defendant's banking books in 1869; that the entries therein in the account of James Curran were made by him as the transactions occurred; and that the same were correct. He also stated that the $540 placed to the credit of Curran was the same deposit for which the cer-

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tificate was given, and that Curran checked out all of the money he deposited in the defendant's bank in 1869, and that the reason he did not require a surrender of the certificate for the $540 was that he supposed it to be merely a receipt for the money. He also said that he had no independent recollection of these transactions other than the deposit of the $540, which he did remember. The court sustained objections, made when the deposition was taken, to all the above testimony and to all testimony of a like character, and excluded the same.

The entries in defendant's books showing the account of James Curran with the bank was also offered in evidence and rejected. This account shows credits to Curran to the amount of $758.80, the first item being for $540 under date of October 6, 1869, and that it was all drawn by him on checks between October 8, and October 12, 1869. This is the account which Moody testified was in his handwriting and was correct.

The defendant having thus failed to get in any proof that the money for which the certificate was given had been paid, the court overruled the defense of the statutes of limitations, and directed a verdict for the plaintiff for $540 and interest thereon from the commencement of the action. A motion for a new trial was denied. The defendant appeals from the judgment entered pursuant to the verdict.

The cause was submitted for the appellant on the brief of *Gardner & Gaynor*, and for the respondent on that of *Raymond & Haseltine.*

For the appellant it was argued, among other things, that the testimony of Moody was admissible. All that is required in the case of *original memoranda* is that the witness shall be able to state that the memoranda are correct. *Downer v. Rowell*, 24 Vt. 346–7; *Merrill v. I. & O. R. Co.* 16 Wend. 596–8; *State v. Rawle*, 2 Nott & McCord, 334; 1 Greenl. on Ev. secs. 436–8; 1 Wharton on Ev. secs. 518,

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519, 679, 680; Wood's Prac. Ev. 368–370; *Chamberlain v. Carter*, 19 Pick. 190; *Guy v. Mead*, 22 N. Y. 462; *New York v. Second Ave. R. Co.* 102 N. Y. 572; *Schettler v. Jones*, 20 Wis. 417–18; *Riggs v. Weise*, 24 id. 545. A promissory note, payable on demand, whether with or without interest, is due forthwith, so that the statute of limitations begins to run from the date of the note. *Wheeler v. Warner*, 47 N. Y. 519; *Palmer v. Palmer*, 36 Mich. 487; *Herrick v. Woolverton*, 41 N. Y. 600; *Newman v. Kettelle*, 13 Pick. 418; *Larason v. Lambert*, 12 N. J. Law, 247; *Kingsbury v. Butler*, 4 Vt. 458. This certificate of deposit is, in legal effect, a promissory note payable on demand, and the statute should begin to run at its date. *Cate v. Patterson*, 25 Mich. 191; *Tripp v. Curtenius*, 36 id. 494; *Brummagim v. Tallant*, 29 Cal. 503; *Poorman v. Mills*, 35 id. 118.

To the point that a demand was necessary before suit could be maintained on the certificate, and that the statute of limitations began to run only from the date of such demand, counsel for the respondent cited *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320; *Pardee v. Fish*, 60 N. Y. 265; *Munger v. Albany City Nat. Bank*, 85 id. 587; *Payne v. Gardiner*, 29 id. 171.

Lyon, J. In *Klauber v. Biggerstaff*, 47 Wis. 551, the late chief justice, after giving the elementary definition of a promissory note, proceeded to say that "the ordinary form of a certificate of deposit of money falls precisely within the definition, and it seems strange that there was ever a doubt that it was in law a negotiable promissory note. *O'Neill v. Bradford*, 1 Pin. 390, and cases there cited. Such doubt, however, may now be considered at rest. *Kilgore v. Bulkley*, 14 Conn. 362; *Bank of Orleans v. Merrill*, 2 Hill, 295; *Miller v. Austen*, 13 How. 218." After this authoritative statement of the rule, it is useless to cite any more of the

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numerous cases elsewhere which hold the same doctrine. Several of them will be found in the brief of counsel for the defendant. The certificate of deposit in suit is in the ordinary form of such instruments, and is therefore, in substance and legal effect, a negotiable promissory note.

The next question is, When did the statute of limitations commence to run against the certificate? The plaintiff maintains that it commenced to run only upon demand of payment, which was first made in 1885; while the defendant claims that it commenced to run as soon as the certificate was issued. There are plenty of adjudications by courts of great authority sustaining both of these propositions. The question is now presented to this court for the first time; and we must choose between these conflicting lines of authority, and adopt the rule which seems to us to rest on the soundest principles and which best accords with the analogies of the law.

What would be the equivalent of this certificate were it put in the usual form of a promissory note? Undoubtedly it would be for the same amount, payable on demand to the same payee or order, perhaps at the office of the maker, and probably without interest until actual presentation and demand of payment. It would be substantially in this form: "For value received, on demand, I promise to pay James Curran, or order, at my bank in Grand Rapids, Wisconsin, $540, without interest until after demand." That such a note is due presently and the statute of limitations commences to run against it from its date, is well settled. What valid reason can be given why the same results should not follow the giving of a certificate of deposit which contains the same contract and is the exact equivalent of such a note? If any such reason exists, we have failed to comprehend it. In *Brummagim v. Tallant*, 29 Cal. 503, it was held that the statute of limitations begins to run against a banker's certificate of deposit payable on

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demand from the date of the same, and that no special demand is necessary to put the statute in motion. We entirely agree with the supreme court of Michigan, which in *Tripp v. Curtenius*, 36 Mich. 496, after approving the rule of the California case, proceeds to say of a certificate of deposit in the usual form: "To hold such instruments to be in legal effect promissory notes payable on demand, and yet not apply the principles applicable to demand promissory notes, either because of the peculiar form of the instrument or because issued by a firm engaged in the ordinary business of banking, would be to create a distinction unsound in principle, and one not warranted by any necessity that we can discover." See, also, *Cate v. Patterson*, 25 Mich. 191; *Poorman v. Mills*, 35 Cal. 118.

The cases which hold that such a certificate is not due until presented for payment, and hence that the statute of limitations does not commence to run against it until such presentation, seem to go upon the ground that the transaction is not alone of money, creating a debt against the drawer of the certificate, but rather that it is in the nature of a bailment, upon which no cause of action accrues until demand; in other words, it is said the transaction is in contemplation of law a deposit and not a loan. This doctrine is held or intimated in *Payne v. Gardiner*, 29 N. Y. 146; *Munger v. Albany City Nat. Bank*, 85 N. Y. 589; *Nat. Bank of Fort Edward v. Washington Co. Nat. Bank*, 5 Hun, 605; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320; and *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377. With all due deference to the very able courts which have adopted this view, we cannot give our approval to the doctrine thus enunciated by them. We think that when a person deposits money in a bank in the usual course of business he loans it to the bank, and the bank thereby becomes his debtor to the amount of the deposit,—not his bailee of the money. By the deposit the title to the money passes

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to the bank, and it is thereafter its money, subject to its absolute control and disposition. The depositor cannot reclaim the specific money. He cannot maintain replevin or trover for it (as he might were the deposit a bailment), but only *assumpsit* for the amount deposited. In short, the transaction has no element of a bailment, but every essential element of a loan of money. That was the view of Judge BRONSON in *Downes v. Phœnix Bank*, 6 Hill, 297, which was an action for the amount of a deposit, the evidence of which was the entry made by the proper officer of the bank in plaintiff's bank book. The judge said, speaking of the transaction: "It is not strictly a deposit, nor a bailment of any kind; for the same thing is not to be returned, but another thing of the same kind and of equal value. In the civil law it is called a *mutuum* or loan for consumption. Except where the deposit is special, the property in the money deposited passes to the bank, and the relation of debtor and creditor is created between the parties."

It is unnecessary to prolong this discussion. We must hold, with the Michigan and California courts, that the money claimed in this action was due and payable at the date of the certificate in suit,—October 6, 1869,—and hence that the claim was barred by the statute (R. S. sec. 4222) on and after October 7, 1875. Sec. 4234 has no application to this action, because James Curran died more than one year before the statute had run against the claim. That section provides that "if a person entitled to bring action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within one year from his death." It is obvious that this provision only reaches a case where the person entitled to bring the action dies during the last year of the term of limitation. Neither is sec. 4251, which doubles the period of limitation in a certain

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contingency, applicable to this case. That section only applies to cases in which there is no person in existence when the cause of action accrues who can bring the action. We are further of the opinion that this case is not within the provisions of sec. 4230, R. S., which is a part of chapter 177. That chapter contains the statute of limitations. The section provides that "none of the provisions of this chapter shall apply to any action brought upon any bills, notes, or other evidences of debt issued by any bank, or issued or put into circulation as money." The certificate of deposit in suit was not issued by a bank; neither was it put into circulation as money.

The claim having been barred by the statute of limitations long before the action was commenced, instead of directing a verdict for the plaintiff the court should have directed the jury to find for the defendant.

The rejection of the testimony of the witness Moody was also error. On the authority of *Schettler v. Jones*, 20 Wis. 412, his testimony, founded on the entries made by him in the defendant's account-books, should have been received, although he had no independent recollection of the transactions thus entered. In the opinion by Chief Justice Dixon in *Schettler v. Jones*, the rule in its application is thus stated: "The charges were not mere private *memoranda* made by the witness for his own convenience, but entries in the books of the plaintiff in the regular course of business. In such cases, we think the sounder and better rule to be that if the witness can swear positively that the *memoranda* or entries were made according to the truth of the facts, and consequently that the facts did exist, that is sufficient, though they may not remain in his memory at the time he gives his testimony. He may testify from the entries; and when he does so he swears positively to the truth of the facts stated in them." This case was followed, and the same rule applied, in *Riggs v. Weise*, 24 Wis. 545. Many

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cases in support of the rule are cited in the opinion in *Schettler v. Jones*, and in the brief of counsel for defendant in the present case.

By the Court.— The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

See note to this case in 31 N. W. Rep. 710.— REP.

LAMOREUX, Appellant, vs. HUNTLEY, Administrator, etc., and others, Respondents.

December 21, 1886 — January 11, 1887.

(1) Mortgage: Tax deed and quitclaims taken as security. (2) Bona fide purchaser: Quitclaim. (3) Evidence: Declarations as to title. (4) Landlord and tenant: Notice of application for tax deed. (5) Possession of land: Notice to purchaser.

1. A. purchased land, taking title to a part thereof in his son's name. B. obtained a tax title to that part which was in the name of A., and afterward quitclaimed to C., who quitclaimed to D. A.'s son also quitclaimed to D. The evidence is *held* to warrant a verdict to the effect that D. took and held the title merely as security for advances made to A. or for his benefit.
2. While so holding title to the land D. quitclaimed to E. and afterwards, with the knowledge of E., had a settlement with A. and conveyed the land to F. for the benefit of A. It did not appear that there was any consideration for the quitclaim deed to E., and that deed was not recorded until long after the conveyance to F. A. remained in the actual possession of the land all the time. In an action brought by the successor to E.'s title against the heirs of A. it is *held* that E. was not a *bona fide* purchaser, and that he and his grantees were bound by the transactions between D. and A.
3. In such action the declarations of A., made while he was in possession, as to his ownership and the nature of his possession, and the declarations of D., made after he had quitclaimed to E. and after A. had notice of that fact, were admissible in evidence on the part of the defendants.
4. The fact that notice of the application for a tax deed was served upon the person in possession of land is strong evidence that he

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was not in possession as a tenant of the holder of the tax certificate, as in that case no notice would be necessary.

5. Actual possession of land is notice to a purchaser of the rights of the occupant, unless the purchaser derives his title from or through such occupant.

APPEAL from the Circuit Court for *Portage* County.

Ejectment. The action was brought by *Charles A. Lamoreux* against *Charles Myers*, the son, *Eliza Myers*, the widow, and *Frederick Huntley*, the administrator of the estate of J. L. Myers, deceased. The facts are stated in the opinion. The jury found a special verdict substantially as follows: (1) The plaintiff was not, at the time of the commencement of the action, the owner or entitled to the possession of the land in question; (4) J. L. Myers did not, at the time of his death, occupy or hold the land in question as tenant of O. H. Lamoreux or his grantors; (6) O. H. Lamoreux took the title to the lands from the McDills and C. C. Myers at the request of J. L. Myers, (7) under an agreement with the latter that he would hold such title as security for money then advanced for, or previously owing to him from, said J. L. Myers; (8, 9) in December, 1869, the said indebtedness from J. L. Myers to O. H. Lamoreux was settled and discharged by Lamoreux deeding the land in controversy to Herren, at the request and for the benefit of Myers, and by retaining to himself as owner, with Myers' consent, the balance of the lands deeded by the McDills and C. C. Myers.

From the judgment in favor of the defendants the plaintiff appealed.

For the appellant the cause was submitted on the brief of *Raymond & Haseltine*. They contended, *inter alia*, that it was error to admit evidence of the declarations of J. L. Myers that Lamoreux's interest in the place was only by virtue of some tax certificates he had, or that he and Lamoreux had settled up the farm business and were square

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now, he taking the north half and giving Lamoreux the south half. While it is allowable to prove the statements of one in possession and explanatory thereof, it is not permissible to show everything that may have been said by him in respect to the title, as to how, when, or from whom the title was acquired. *McBride v. Thompson*, 8 Ala. 650; *Abney v. Kingsland*, 10 id. 355; *Rowland v. Boozer*, id. 694; *Scott v. Dansby*, 12 id. 719; *Thompson v. Mawhinney*, 17 id. 362; *Allen v. Prater*, 30 id. 460. It was also error to admit the acts and declarations of O. H. Lamoreux, done and made after his conveyance to W. O. Lamoreux. It appears that Myers was informed that he had so conveyed prior to the alleged settlement and division of the farm. Such being the case no settlement could bind W. O. Lamoreux and his grantees. It was also error to admit the declarations of O. H. Lamoreux after he had parted with his title to the lands and was not in possession thereof. *Padgett v. Lawrence*, 10 Paige, 170; *Felder v. Bonnett*, 2 McMullen's Law, 44; *Settle v. Alison*, 8 Ga. 201; *Gill v. Stroizier*, 32 id. 696; *Sharp v. Wickliffe*, 3 Litt. 10; *Barrett v. French*, 1 Conn. 354; *Pettibone v. Phelps*, 13 id. 450; *Reichart v. Castator*, 5 Binn. 109; *Brashear v. Burton*, 3 Bibb, 9; *Bogert v. Phelps*, 14 Wis. 88; *Welch v. Sugar Creek*, 28 id. 618; *Bates v. Ableman*, 13 id. 644; *Fay v. Rankin*, 47 id. 400.

For the respondents there was a brief by *Cate, Jones & Sanborn*, and oral argument by *Mr. Jones*. To the point that the declarations of J. L. Myers were admissible for the purpose of showing that he claimed the land in his own right and not as the tenant of Lamoreux, they cited *Kelly v. Kelly*, 20 Wis. 443; *Meade v. Black*, 22 id. 241; *Roebke v. Andrews*, 26 id. 311; *Gill v. Crosby*, 63 Ill. 190; *Whitaker v. Wheeler*, 44 id. 440; *Williamson v. Williams*, 11 Lea, 355; *Sweltenham v. Leary*, 18 Hun, 284; *Sutton v. Cassellegi*, 5 Mo. App. 111; *Dodge v. Freedman's S. & T. Co.* 93 U. S. 379; *Hunt v. Haven*, 56 N. H. 87; *Yates v. Yates*, 76 N. C.

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142; *Thomas v. Wheeler*, 47 Mo. 363; *Keator v. Dimmick*, 46 Barb. 158; *Abend v. Mueller*, 11 Ill. App. 257.

TAYLOR, J. This is an action of ejectment to recover the possession of five forty-acre tracts of land, less about eighteen acres off the south side of the tract. On the trial the evidence showed that J. L. Myers, the deceased, had purchased from the government all the lands in question, except two forty-acre tracts, and that these two tracts were purchased from the government in the name of his son, C. C. Myers, but with the money and for the benefit of J. L. Myers, deceased. The record does not disclose that J. L. Myers, so far as the lands in controversy are concerned, ever conveyed the title he procured from the government to any other person. As to the two forty-acre tracts purchased by C. C. Myers, the record discloses that he conveyed said tracts to O. H. Lamoreux on the 27th of January, 1868, and that afterwards, and on the 11th day of December, 1869, O. H. Lamoreux and wife conveyed all the lands in question to one Ashebel Herren, a relative of said J. L. Myers; and the defendants claim that this deed was made to said Herren for the use and benefit of the said deceased; that the dedeceased went into the actual possession of these tracts of land as early as 1854, and continued in the actual possession thereof until his death in 1884.

The plaintiff, to establish his title to said lands, introduced a tax deed for all of said lands, except the two forty-acre tracts entered by C. C. Myers, from Portage county to one James Scott, bearing date May 28, 1864; a quitclaim deed from James Scott to McDill, dated November 1, 1866; a deed from McDill and wife to O. H. Lamoreux, dated January 27, 1868; a deed from C. C. Myers to said O. H. Lamoreux for the two forty-acre tracts above mentioned, dated January 27, 1868; a quitclaim deed from O. H. Lamoreux and wife to his son W. O. Lamoreux, dated April 7, 1869,

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but not recorded until April 12, 1871, of all the lands in controversy; a quitclaim deed from W. O. Lamoreux to F. B. Lamoreux, dated July 6, 1874, of all the lands; a quitclaim deed from F. B. Lamoreux to the plaintiff, bearing date August 5, 1884. Plaintiff also offered a tax deed from Portage county to W. O. Lamoreux, dated June 11, 1872, and recorded on the same day.

There is no claim of title made by the plaintiff under this last tax deed, as it was clearly barred by the three-years statute of limitations, which was pleaded as a defense to such deed in the answer of the defendants. Upon the record evidence, the only title shown in the plaintiff was based on the tax deed to Scott in 1864, and deed of the two forty-acre tracts by C. C. Myers to O. H. Lamoreux in 1868; and if the deed from O. H. Lamoreux to Ashebel Herren, made December 11, 1869, for the benefit of J. L. Myers, deceased, is to have precedence over the deed by O. H. Lamoreux to his son W. O. Lamoreux, made April 7, 1869, but not recorded until 1871, then the plaintiff has failed to show a legal title to any part of the lands in dispute.

On the trial it was contended, on the part of the defendants and respondents, that O. H. Lamoreux held the title to all the lands in question in 1869, when he conveyed to W. O. Lamoreux, as security for the money he advanced to the McDills for the conveyance from them to him in 1868, and perhaps for some other money advanced to J. L. Myers by said O. H. Lamoreux. This was in fact the main question litigated on the trial, and upon this question the jury found in favor of the defendants. After a careful consideration of the evidence, it would seem the finding of the jury on this point is well supported by the evidence. Scott and McDill both testified on the trial that, when they held the title under the tax deed, they held it as security for the moneys advanced by them to procure the title, and for taxes paid by them on the lands at the request of J. L. Myers.

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McDill also testified that he deeded the lands to O. H. Lamoreux at the request of J. L. Myers, and that all the consideration he received for such conveyance was the sum Myers owed McDill. If Scott, the McDills, or O. H. Lamoreux obtained any title to the lands in controversy under the tax deed to Scott, such title must have been obtained by virtue of some arrangement with J. L. Myers. Without the assent of Myers, neither of them would have obtained any title by virtue of said tax deed, as all the evidence shows that J. L. Myers was in the actual possession of the lands when the deed was issued in 1864, and remained in such actual possession from that time until his death in 1884, as to the lands in controversy in this action. Under this state of the evidence, the tax deed would show no title in Scott or his grantees, had the statute of limitations been pleaded as to that tax deed. Whether the statute is sufficiently pleaded in this case need not be determined. It is quite clear that Myers retained some interest in the lands, or had some claim of title thereto, at the time O. H. Lamoreux conveyed the lands to W. O. Lamoreux. The appellant claims that at that time J. L. Myers was in possession as the tenant of O. H. Lamoreux, and the defendants claim that he was in possession as the owner of the title, subject to the mortgage claim of O. H. Lamoreux.

There is one piece of evidence in the case which does not rest in the mere memory of the witnesses, viz., the notice served upon J. L. Myers in 1872, by William O. Lamoreux, upon his application for a tax deed on tax certificates issued in 1867. Now, if J. L. Myers was in possession of those lands in 1872 as the tenant of O. H. Lamoreux or W. O. Lamoreux, as now claimed by them, there would have been no necessity of giving notice to him in order to make their tax deed valid. In order to acquire a tax deed, no notice to the person in possession of the land is required when the person in possession is holding under the person owning the

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tax certificate. See sec. 1175, R. S. 1878. The service of this notice is strong evidence that W. O. Lamoreux did not consider J. L. Myers as his tenant of the premises in 1872, but as holding the possession under a claim of title adverse to him.

The jury having found that O. H. Lamoreux's interest in the land in controversy was only a mortgage interest when he conveyed to W. O. Lamoreux in 1869, W. O. Lamoreux took no greater interest in the land than his grantor had therein. J. L. Myers being in the actual possession at the date of the deed to W. O. Lamoreux, and the title conveyed not being derived directly from J. L. Myers as the original owner, W. O. Lamoreux, as the grantee of O. H. Lamoreux, was bound to take notice of the right of J. L. Myers, who was in the possession of the lands at the date of the conveyance. Had O. H. Lamoreux derived his title to the lands in controversy by a conveyance from J. L. Myers, the mere fact that Myers remained in possession after he had conveyed away his title might not of itself have been notice to O. H. Lamoreux's grantee that he had any claim to the lands adversely to his grantee, O. H. Lamoreux.

The record evidence not showing any title in O. H. Lamoreux derived from J. L. Myers, and the evidence showing an actual possession by J. L. Myers at the date of the conveyance of O. H. Lamoreux to W. O. Lamoreux, W. O. Lamoreux took the title subject to any valid claim which J. L. Myers had to the same, and his possession was sufficient notice to him of his claim. See *Bull v. Bell*, 4 Wis. 54; *Wicke v. Lake*, 21 Wis. 410; *S. C.* 25 Wis. 71; *Quinlan v. Pierce*, 34 Wis. 304; *Ely v. Wilcox*, 20 Wis. 523; *Fery v. Pfeiffer*, 18 Wis. 510; *Cunningham v. Brown*, 44 Wis. 72; *Thrall v. Thrall*, 60 Wis. 503; *Gee v. Bolton*, 17 Wis. 604; *Stewart v. McSweeney*, 14 Wis. 468; *Warner v. Fountain*, 28 Wis. 405; *Ehle v. Brown*, 31 Wis. 405; *Brinkman v. Jones*, 44 Wis. 498; *Bergeron v. Richardott*, 55 Wis. 129.

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It is insisted on the part of the appellant that even if it should be held that the evidence shows that the title taken by O. H. Lamoreux from the McDills was taken as security, and was in the nature of a mortgage, the verdict should have been in favor of the appellant upon the ground that a new arrangement was made between O. H. Lamoreux and J. L. Myers, the deceased, by virtue of which Myers abandoned all claim to the land, except that he was to occupy the same as tenant for life at a mere nominal rent. A very large part of the evidence introduced on the part of the appellant was directed to this question; and it was testified to by several of the appellant's witnesses that the deceased had frequently declared that he was in possession as the tenant of O. H. Lamoreux, or of his grantee, W. O. Lamoreux. On the other hand, the defendants produced evidence strongly tending to show that in 1869 O. H. Lamoreux and the deceased had a settlement of all their matters, and on such settlement the large farm of 520 acres was divided, and the south half was surrendered to O. H. Lamoreux, who took possession thereof and has since held the same, and that upon such division O. H. Lamoreux conveyed the north half of the farm to one Ashebel Herren, a relative of J. L. Myers; that said conveyance was made to said Herren for the benefit of and was delivered to said Myers; and that since said conveyance the deceased occupied said north half of the farm, claiming to own the same in fee, and O. H. Lamoreux, or those claiming under him, occupied the south half thereof, claiming to own the same.

Upon this question the jury have also found in favor of the defendants, and upon evidence which we think fully justifies the finding. The fact of giving the deed to Herren by O. H. Lamoreux at the request of and for the use of Myers is very strong evidence against the claim now made by the appellant. Had the deed been given directly to Myers, it would have been in itself almost conclusive evi-

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dence against the claim made by the appellant. It seems almost incredible that O. H. Lamoreux should have made a deed conveying the fee of the lands to Myers, or to another for his benefit, when it was intended that it should only convey a life-interest or no interest at all. The inherent improbability of the transaction being of the nature now claimed by the appellant, together with the other evidence in the case, was a sufficient justification for the verdict of the jury that there was no tenancy in fact, and that the transaction was a full settlement of all claims on the part of O. H. Lamoreux to the lands in controversy. Had the deed been to Myers himself, we think all this evidence, tending to show by parol that the deed was in fact only a life-lease, would have been wholly incompetent and inadmissible. Whether it was inadmissible in the case at bar we are not called upon to determine, as the jury have found against the appellant's claim.

It is urged that the deed by O. H. Lamoreux, made in 1869 to Herren, and any arrangement then made by him with Myers, should not bind the plaintiff. We think that the evidence fails to show that W. O. Lamoreux or those claiming under him are *bona fide* purchasers without notice of the claim of Myers. On the other hand, we think the fact that they take their title by quitclaim deed without showing that there was in fact any consideration for such conveyance, the fact that the deed to W. O. Lamoreux was not recorded until two years after it purports to have been executed, and the fact that O. H. Lamoreux did all the negotiations with Myers in regard to this land after his conveyance to W. O. Lamoreux, with the knowledge of said W. O. Lamoreux, justify the conclusion that O. H. Lamoreux was in fact the real party interested in this land, and his acts must be held to bind the parties claiming under the deed from him to W. O. Lamoreux. See *Martin v. Morris*, 62 Wis. 418, 428.

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In this view of the case, the court did not err in not treating W. O. Lamoreux as an innocent purchaser without notice of the claims of Myers; nor did the court err in refusing to instruct the jury that W. O. Lamoreux could not be bound by the transactions between the deceased and O. H. Lamoreux unless he had actual notice of the claim of Myers, the deceased. Upon all the evidence, we think there was no error in admitting in evidence the declarations of O. H. Lamoreux, after he had conveyed the premises to W. O. Lamoreux, and after Myers had actual notice of that fact, if the evidence shows he had such notice. We think the whole evidence shows that the title held by W. O. Lamoreux was held for the benefit of O. H. Lamoreux, or, if not so held, W. O. Lamoreux permitted O. H. Lamoreux to deal with it as though held for his benefit, and sanctioned what was done by him in regard to it.

The objections to the evidence of the declarations of the deceased as to his ownership of the land, made while he was in possession of the same, and that he was not holding possession as tenant of the grantor of the plaintiff, we think were properly overruled. The evidence was admissible under the rule laid down by this court in the cases of *Kelley v. Kelley*, 20 Wis. 443; *Meade v. Black*, 22 Wis. 241; *Roebke v. Andrews*, 26 Wis. 311,—as well as by the cases cited by the late Justice PAINE in his opinion in the case last above cited.

The case seems to have been fairly tried upon both sides, and the verdict of the jury is fully sustained by the evidence, and we find no errors in the record which would justify a reversal of the judgment.

By the Court.— The judgment of the circuit court is affirmed.

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KICKLAND, Respondent, vs. THE MENASHA WOODEN WARE COMPANY, Appellant.

December 21, 1886 — January 11, 1887.

VENDOR AND PURCHASER OF LAND. *(1) Consideration: Parol evidence. (2) Statute of frauds. (3) Agency: Ratification. (4) Apportionment.*

1. A consideration in addition to that expressed in a deed may be shown by parol.
2. An oral agreement to pay a consideration in addition to that expressed in a deed is valid.
3. An agent, having authority to purchase certain land for a corporation, paid a certain sum therefor, and agreed to pay a further sum at a future time. The deed to the corporation expressed only the consideration already paid. The corporation took possession of the land and afterwards sold it. *Held*, that the corporation was bound by the agreement to pay the additional consideration.
4. The purchaser of land agreed that if he should sell it at an advanced price he would pay one half of the profits of such sale to his grantor. He afterwards sold the land, together with another tract bought from other parties on similar terms, for a gross sum. *Held*, that the amount to be paid to his grantor should be determined by an *apportionment* of the sum received according to the respective values of the tracts sold.

APPEAL from the Circuit Court for *Portage* County.

Action to recover the sum of $300 alleged to be due to the plaintiff as the balance of the purchase money of a tract of land sold by him to the defendant company. The answer was a general denial. The facts are sufficiently stated in the opinion. There was a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

For the appellant the cause was submitted on the brief of *Raymond & Haseltine.* They contended, *inter alia*, that a contemporaneous oral agreement for the payment of an additional sum to that specified in the deed cannot be upheld. *Schermerhorn v. Vanderheyden*, 1 Johns. 139; *Howes v. Barker*, 3 id. 506; *Maigley v. Hauer*, 7 id. 341; *Win-*

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chell v. Latham, 6 Cow. 682–690; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Morse v. Shattuck*, 4 N. H. 229; *Fishback v. Woodford*, 1 J. J. Marsh. 84; *Williamson v. Berry*, 8 How. 495, 563–4. Cases holding that the acknowledgment of the *receipt* of the consideration expressed in the deed is not conclusive, are clearly distinguishable. *M'Crea v. Purmort*, 16 Wend. 460; *Shephard v. Little*, 14 Johns. 210; *Bowen v. Bell*, 20 id. 338; *Wilkinson v. Scott*, 17 Mass. 249; 30 Am. Dec. 117. This court has allowed the consideration to be inquired into, but never for the purpose for which this action is brought. *Frey v. Vanderhoof*, 15 Wis. 397; *Farmers' L. & T. Co. v. Comm. Bank*, id. 424; *Hannan v. Oxley*, 23 id. 519; *Horner v. C., M. & St. P. R. Co.* 38 id. 165. Before a recovery could be had in a case like this, an action must be maintained in equity to reform the deed. Again, the oral contract for the sale of the lands was void by the statute of frauds. It became valid only when reduced to writing and signed. And that part of the agreement, if any, which was not reduced to writing is still within the statute and void. See Sugden on Vendors, ch. 4, sec. 8, subd. 2, 3; 3 Sutherland on Damages, 137.

For the respondent there was a brief by *Cate, Jones & Sanborn*, and oral argument by *Mr. Jones*.

Orton, J. In 1878 one E. D. Smith was director and superintendent, and one Henry Hewitt, Jr., was director of the defendant company. Hewitt, on behalf of the company, negotiated a bargain with the plaintiff for the purchase from him of a strip of land one rod wide, lying along the Wisconsin river, including lakes and bayous leading into the river, for rafting and booming purposes, on lots 1 and 2, in section 15, town 24, range 7 east, for the use of said company; and Smith, on behalf of said company, consummated said bargain by paying the said plaintiff down $100 and by receiving a deed of conveyance to said company from said

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plaintiff of said premises. The said $100 was the nominal consideration in said deed, but it was a part of said bargain that, in addition to said $100 named in the deed and as part of the consideration of said purchase, whenever and at such time as the said company shall sell said premises it shall pay to said plaintiff one half of the excess it shall receive as the consideration of such sale over and above said $100, after deducting from the excess costs, expenses and improvements, as the whole of said consideration. About the same time the company so purchased of the said plaintiff and so agreed, it purchased of one Jessie Martin and one John Riches a tract of land of about ten acres adjoining the premises so purchased of the plaintiff, by and through the agency of said E. D. Smith, and on behalf of the company; and it was agreed that $300 should be the nominal consideration of the conveyance thereof, but that whenever the company should sell said land, it should pay to them one half of the consideration of such sale over and above said $300, deducting costs, expenses, and improvements, which, together with the said $300 paid and named in said conveyance, should constitute the full consideration of said purchase; and the company received a deed of said Martin and Riches for that consideration and on such condition, which, in effect, was the same agreement as to a future sale of the premises as the one made between the company and the plaintiff.

The said Smith had said deeds duly acknowledged and recorded, and the company entered into possession of the premises. In 1882, the company, without making any improvements upon the premises purchased of the plaintiff, but having made some improvements on the premises purchased of said Martin and Riches, sold the whole of both of said premises to the Webster Manufacturing Company for $2,000, and the purchase money was paid into its treasury. This deed was executed by E. D. Smith as the then president, and by H. S. Smith as the secretary, of the company. The contingency

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upon which the balance of the purchase money has become due and payable having transpired, the plaintiff now demands judgment for one half of the amount for which said premises so conveyed by him to the company was sold in excess of said $100, and deducting costs, expenses, and improvements, if any, to be ascertained by the proportionate value of the two premises or tracts of land so sold and conveyed to the company, which sum so demanded he alleges to be $300. These are substantially the facts proved.

In disposing of the questions raised on this appeal, it will be unnecessary to specially refer to the several errors complained of in admitting evidence, in instructing the jury, or in refusals to instruct as asked by the appellant; for the questions arise upon the mere statement of the facts and are not difficult of solution. In the order in which these questions are discussed in the brief of the learned counsel of the appellant, they are:

First. That the terms of the deed as to the amount of the consideration cannot be changed by parol. There was formerly some conflict in the authorities upon this question, but since the case of *Hannan v. Oxley*, 23 Wis. 519, it has not been an open question in this state. It was there held "that parol proof may be given to show an additional consideration not inconsistent with the deed." See authorities cited in the opinion. This case has been frequently followed by this court. *Horner v. C., M. & St. P. R. Co.* 38 Wis. 165; *De Forest v. Holum*, 38 Wis. 516.

Second. That this agreement to pay more than the consideration named in the deed is void by the statute of frauds. It is not perceived how this question can be raised in such a case. The deed is valid as a conveyance of the land, and the respondent does not seek to impeach it or to change it in any manner as a valid conveyance. He only seeks to prove by parol what was the whole consideration of the sale, and that a considerable part thereof has not

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been paid. A promise to pay money, supported by a sufficient consideration, cannot be held void because it was in *parol*, most certainly; and this was all the respondent sought to show. There is consideration expressed in the deed sufficient to support it and take it out of the statute. The additional consideration of the sale not paid, whether resting in parol or in writing, cannot affect the deed as a valid conveyance under the statute in any respect. It seems to be well settled that it is competent to prove by parol what the real consideration agreed to be paid was, and to show that the same or some part of it remains unpaid, though not thereby to impeach the title conveyed by the deed. 3 Washb. Real Prop. (3d ed.), 327; *Kimball v. Walker*, 30 Ill. 510; *Villers v. Beamont*, 2 Dyer, 146; Phil. Ev. 482; *Belden v. Seymour*, 8 Conn. 304,— cases cited in respondent's brief. But the cases above cited from our own court are sufficient. The learned counsel of the appellant admits, and cites cases to that effect, that parol evidence that the consideration named and receipted in the deed has not been paid may be proper; citing *Shephard v. Little*, 14 Johns. 210. Although in that case it was only sought to prove that the consideration named in the deed had not been paid, yet Judge SPENCER, in his opinion, cites the case of a lease where parol evidence was held admissible to prove an *additional* rent to be paid by the tenant beyond that expressed in the lease, and he says, near the close of the opinion, that "although you cannot by parol substantially vary or contradict a written contract, yet these principles are inapplicable to a case where the payment or *amount* of the consideration becomes a material inquiry." This language is repeated by Judge WOODWORTH in a similar case of *Bowen v. Bell*, 20 Johns. 338. The case of *M'Crea v. Purmort*, 16 Wend. 460, also cited by the learned counsel of the appellant, was one where the clause in the deed, acknowledging the receipt of a certain *sum of*

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money as the consideration of the conveyance, was held open to explanation by proof in parol that the consideration was to be paid in *bar iron* at a stipulated price. In *Wilkinson v. Scott*, 17 Mass. 249, it was held that the receipt or acknowledgment of the payment of the consideration in a deed was only *prima facie* or presumptive evidence of it and was open to explanation by parol; and that it was not a case within the statute of frauds, because it was not a contract for the sale of land; that *that* contract was executed and finished by the deed; and that it was only a demand for money arising out of the contract. If proving that no part of the consideration had been paid, against the receipt in the deed and acknowledgment by the deed that it had been paid, is proper, as the learned counsel admits, although so far in contradiction of the deed itself, how much more proper to prove an *additional* consideration not expressed or receipted in the deed. But enough on these first two points. See 2 Phil. Ev. 655, marginal, and cases cited in note 2.

Third. That the said E. D. Smith, who consummated this contract of purchase, had no authority from the corporation to act as its agent in doing so, and especially had no authority to make the agreement to pay the plaintiff such additional consideration for the purchase. It is not strenuously insisted that he did not have authority to purchase the premises for the consideration named in the deed. It could not be reasonably so claimed, for the corporation defendant received all of the fruits of the purchase, and sold and conveyed the premises at a large profit to the Webster Manufacturing Company, and received the consideration, and in the most positive manner ratified and assumed the acts of the pretended agent Smith in making such purchase and paying the consideration named in the deed and in the taking of the conveyance to the company. But it is claimed that, there being no proof that the com-

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pany ever had any notice of the promise to pay this additional consideration, it therefore could not and has not ratified it. The ratification of the acts of the agent in any particular transaction is equivalent to his having prior authority from the principal to do them. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* It follows, then, that this case must be treated as if E. D. Smith, the director, had original authority from the corporation to make this purchase so far as any act of his is apparent on the face of the deed. But this is not the full extent of the agent's authority. He had authority to make the bargain or the contract of purchase which preceded the deed, and which was executed, at least in part, by the conveyance of the premises. And a part of such bargain was that the company should pay this additional consideration.

Had the company any right to assume, from a mere knowledge of the deed, that its agent had not agreed to pay any additional consideration? If it had, then the consideration named in the deed is *conclusive* and not merely *prima facie* or presumptively the whole amount. But we have seen that other and additional consideration may rest in a *parol* promise. Does it not follow that, the company having given the agent authority to make the purchase, such authority extended to the amount of consideration to be paid even beyond that named in the deed?

The legal rule is that the principal is not only liable for the acts of the agent in the *main* transaction, but for his acts, representations, declarations, or admissions within the *scope* of the authority confided to him respecting the subject matter, if done or made at the same time and constituting a part of the *res gestæ.* Story, Ag. § 134, and authorities in note 1. "An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts." Id. § 136, and note. Such agreement or acts may be the very *inducement* of the

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contract of sale. An example is given by the author of this principle, familiar from its frequent occurrence. Thus, for example, what an agent represented at the time of the sale of a horse, which sale was authorized by his master, whether it be a representation or a warranty of soundness or of any other quality, will be binding upon the master. Id. § 137.

Suppose the master is not informed of anything but the sale. Is he not bound? *Mundorff v. Wickersham*, 63 Pa. St. 87. In this case the plaintiff had lent the defendant a note at the request and by the authority of the defendant's agent, and delivered it to such agent for the defendant, and at the time it was so delivered the agent, without any direct or special authority to do so from the defendant, signed a receipt for his principal, agreeing to protect the note at maturity. The defendant, as principal, was held bound by the agreement, and liable.

But, again, "it is a general rule that, when a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent." So a debtor cannot have the benefit of a compromise and release effected by his agent with his creditors, without adopting all the representations made by the agent to the creditors in negotiating the same. *Ferguson v. Carrington*, 9 Barn. & C. 59; *Corning v. Southland*, 3 Hill, 552; and other cases in note 1 to § 250, Story on Agency. This principle is irrespective of notice to the principal or want of notice as to some part of the contract. But even in respect to notice, notice of facts to an agent is constructive notice thereof to the principal himself when it arises from or is connected with the *subject matter* of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still, the principal having intrusted the agent with the particular business, the other party has the right

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to deem his acts and knowledge obligatory upon the principal. Id. § 140, and note 1.

In the application of these principles, what was the *subject matter* and the *res gestæ*, and what was the *scope* of the agency of E. D. Smith in making the purchase and taking the deed of the plaintiff's land and privileges for the use of the company? Was it not the whole agreement and its terms and conditions? It must be conceded that Smith had authority to pay the $100 and receive the deed. But this was not the whole of the subject matter of the transaction or of the *res gestæ*, or the *scope* of the contract. There was a promise to pay more than the $100 named in the deed, and which may be presumed to have constituted, at least to a great extent, the inducement of the sale. It must be held that the company is bound to pay this additional consideration, because (1) it was a material part of the bargain the agent was authorized to make; (2) the company is bound by the act or promise of the agent within the *scope* of the main transaction which was authorized or ratified by the company, and such promise was a part of the *res gestæ;* (3) the ratification of a part is a ratification of the whole of that particular transaction of the agent; (4) notice to or knowledge of facts by the agent is constructive notice thereof to the principal himself when it arises from or is connected with the subject matter of the agency, and it is presumed that the agent has communicated such facts to the principal, and, if he has not, the principal having intrusted his business to the agent, the other party has the right to deem his acts and knowledge obligatory upon the principal; (5) where a corporation has received the benefit of a contract, it must perform its part of it (*De Groff v. Am. L. T. Co.* 21 N. Y. 127); (6) when a party deals with a corporation in good faith, in respect to matters concerning which it has conferred authority upon the agent, and is unaware of any defect of authority or other irregularity on

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the part of the agent, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity exist (*Gano v. C. & N. W. R. Co.* 60 Wis. 12; *Merchants' Bank v. State Bank*, 10 Wall. 604); (7) the company having accepted the benefit of the contract, and retained the property, or sold it and received the purchase money and retained it as the fruits of the contract, it must carry out all the terms of the contract and pay the full amount of the purchase money agreed to be paid therefor by its agent (*Scott v. M. U. & W. G. R. Co.* 86 N. Y. 200; *Le Neve v. Le Neve*, 3 Atk. 655).

The only other question to be considered is whether the method adopted by the circuit court, by instruction to the jury, and in the admission of evidence, by *apportionment* upon the comparative value of both tracts of land included in the deed of the company to the Webster Manufacturing Company, was the proper manner of ascertaining the amount for which the tract sold and conveyed by the plaintiff to the company was sold for. It was the fault of the company that it sold both tracts together and conveyed them by the same deed for a consideration in gross. This has made such an apportionment absolutely necessary. It cannot be ascertained for what the premises sold by the plaintiff were sold for by the company in any other known way. In such a case, apportionment is the proper method. 1 Bouv. Law Dict. tit. APPORTIONMENT. It is the only method of determining the amounts which each of several parties interested in an estate shall pay towards the removal of an incumbrance on the whole. 1 Washb. Real Prop. 96, 534. It is the only method of ascertaining the damages in case of a breach of the covenant of seizin as to a part only of the premises conveyed. *Hall v. Gale*, 20 Wis. 292; *Noonan v. Ilsley*, 21 Wis. 138. There is no more difficulty in apportioning this excess received by the company, be-

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tween the plaintiff and Martin and Riches, than in any other apportionment. There is no mathematical certainty in any apportionment, for it depends upon comparative values, but it is as near certainty as possible.

This cause was evidently very ably tried, and the rulings of the court seem to have been deliberate and judicious. We do not think there is any error in the record that is material, and the verdict appears to be just and supported by the evidence.

By the Court.—The judgment of the circuit court is affirmed.

See note to this case in 31 N. W. Rep. 476.—REP.

MECHANICS' NATIONAL BANK OF NEW YORK and another, Appellants, vs. LANDAUER, Receiver, etc., Respondent.

December 22, 1886—January 11, 1887.

RECEIVERS. *(1) Action against receiver: Discretion. (2) Fraudulent conveyances: Parties. (3) Partnership: Loss of good-will by receiver. (4) Removal of receiver.*

1. It rests in the discretion of the court to allow a party to bring an independent action against a receiver, or to compel him to proceed by petition in the action in which the receiver was appointed. If the relief sought can be obtained by such petition it is no abuse of discretion to refuse to grant leave to bring an action.
2. A receiver appointed in an action for the dissolution of a partnership is not a necessary party to a suit by certain creditors to set aside alleged fraudulent transfers of the firm property, made before his appointment, or to establish the prior right of such creditors to the assets in his hands.
3. If such receiver has suffered the good-will of the firm to be lost he may be held to account for its value by a proceeding in the action for dissolution.
4. A proceeding for the removal or suspension of a receiver must be taken in the case in which he is receiver.

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APPEAL from the County Court of *Milwaukee* County.

In August, 1884, Elias D. Davis and Ezra Michelbacher were partners in business in Milwaukee, and, being largely in debt and insolvent, they executed several judgment notes, amounting in all to about $15,000, to three different persons. Judgments were immediately entered on these notes in the circuit court, executions were issued, and the judgment debtors' entire stock of goods was seized by virtue thereof and sold to satisfy the judgments. The proceeds of the sale, amounting to something over $11,000, were distributed among the judgment creditors.

Immediately after such sale, persons friendly to Davis & Michelbacher organized a corporation, known as the "E. D. Davis Trading Company, Limited," for the purpose of carrying on the former business of the firm, which it did, and thus acquired the good-will of that business without paying for it. Elias D. Davis was the manager of the corporation business.

As soon as the above-mentioned judgments were entered, Davis commenced an action in the county court against Michelbacher for dissolution of their copartnership, and the closing up of the business of the firm. By consent of the parties, *Max Landauer*, the respondent, was appointed receiver of the property of the firm. Nothing came into his hands as such receiver except the books of account of the firm, on which he has made some collections.

The appellant the *Mechanics' National Bank of New York* is the owner of three judgments, and the appellant the *First National Bank of Chicago* is the owner of two judgments, all recovered between February 23 and June 14, 1885, against the firm of Davis & Michelbacher, upon all of which executions were duly issued and returned wholly unsatisfied on or before December 4, 1885. These judgments amount, in the aggregate, to about $20,000.

Directly after the foregoing transactions, the appellants

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filed their complaint in the county court, in the nature of a creditors' bill, naming as defendants therein the former partners, Davis & Michelbacher, the three judgment creditors first above mentioned, and the respondent, *Max Landauer*, as receiver of the effects of Davis & Michelbacher. This complaint states the above transactions; alleges that the firm of Davis & Michelbacher was not indebted to either of the persons to whom such judgment notes were executed, states the relation and business connections with each other of the persons named as defendants; and charges that all their transactions, as above stated, were collusive and fraudulent, and were the results of a previous fraudulent scheme and conspiracy on their part to cheat the creditors of the firm, including the appellants, out of their just debts.

The prayer for relief is substantially (1) that all the above transactions taken together be declared to amount to a voluntary assignment by Davis & Michelbacher for the benefit of creditors, with preferences, and that the same be adjudged void; (2) that the judgment and execution creditors who received the proceeds of the sale of the stock of goods pay over to the appellants the amount so realized by them; (3) that the receiver account and pay over to the appellants, or the receiver appointed in their said action, the amount realized by him out of the assets of the firm, and the just value of the good-will of the firm, that he assign and transfer to the appellants or their said receiver the unconverted assets of the firm, and that he be suspended from his office of receiver; (4) prayers for an injunction against all of the defendants, and the appointment of a receiver in the appellants' action, or that the court in such action assume control of the respondent, as such receiver.

Thereupon, before service of summons on either of the defendants, the appellants intervened in the case of *Davis v. Michelbacher*, and petitioned the county court for leave to sue the receiver, *Max Landauer*, in the proposed creditors'

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suit. The petition was founded upon the complaint filed in the latter suit. The petition was denied. This appeal is by the two banks, the plaintiffs in the creditors' suit, from the order denying the petition and refusing to grant leave to sue the receiver.

For the appellants the cause was argued orally by *T. R. Shepard.* [No brief on file.]

For the respondent there was a brief by *Jenkins, Winkler, Fish & Smith,* and oral argument by *Mr. Winkler.*

LYON, J. The general question to be determined on this appeal is, Should the county court have granted leave to the appellants to sue the receiver in the proposed creditors' suit? The rules of practice which must control the answer to this question are thus stated by Mr. High in his valuable treatise on the Law of Receivers: "The more common practice, and that which has been generally commended by the courts, is to hear and determine all rights of action and demands against a receiver by petition in the cause in which he was appointed, without remitting the parties to a new and independent suit; and it rests wholly within the discretion of the court to grant leave to bring an independent action against its receiver, or to determine the controversy upon petition in the original cause, directing, if necessary, an issue to be tried by a jury as to questions of fact or of damages. . . . So, if an equitable right or title is asserted in property which is in the custody of a receiver, the court will not ordinarily permit an action to be brought against him, but will require the claimant to proceed by petition; and persons having a claim or lien upon a fund in a receiver's hands should assert such claim by petition, rather than by an action against the receiver." Sec. 254*b*. This is undoubtedly a correct statement of the rules of practice in this behalf which now prevail.

It rests, therefore, in the discretion of the court to allow

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a party claiming rights against its receiver to bring an independent action against him, or to compel such party to proceed against him by petition in the action in which he is receiver. With the exercise of such discretion this court cannot interfere on appeal, unless there has been a manifest abuse of it. In the present case, if the appellants can obtain the same relief against the receiver by petition in the action in which the receiver was appointed that they seek in the creditors' suit, it certainly was no abuse of discretion to deny the petition for leave to sue the receiver in the latter suit.

It appears from the statement of facts herein that the objects of the proposed creditors' suit are (1) to compel the judgment creditors of Davis & Michelbacher, who received the proceeds of the execution sales of the stock of goods, to pay over the amount thereof to the two banks, the appellants, to apply on their judgments against Davis & Michelbacher; (2) to obtain an appropriation of the accounts of that firm in the hands of the receiver, the respondent, and the moneys collected by him thereon, to the payment of their demands; and (3) to enforce payment of a reasonable sum by the respondent for the good-will of such firm, to be applied in like manner. All other relief prayed is only subsidiary to or in aid of these general objects.

Can these objects, so far as they affect the receiver, be as well accomplished by petition in the action to dissolve the partnership of Davis & Michelbacher, in which he was appointed, as they can be in an independent action against the receiver? If so, the order refusing leave to sue should be affirmed.

1. The receiver, as such, has no concern with the claim against the judgment debtors of Davis & Michelbacher for the proceeds of the execution sales. He is not a necessary party to the proposed creditors' suit to enable the appellants to reach that fund. If he was a party to the conspir-

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acy and fraud which resulted in putting that fund in the hands of such judgment creditors, as is charged, such fraud and wrong has no connection with his receivership, and any liability therefor by him to the appellants is purely a personal liability. In order to maintain a personal action against him on account of such liability (if any exists), no leave of court is necessary.

2. If the appellants succeed in establishing a prior lien upon the assets of the firm, to wit, the accounts of the firm and the money collected thereon by the receiver, the court may enforce that lien by its order made in the action of *Davis v. Michelbacher* to dissolve the partnership and wind up its affairs. The receiver was appointed to preserve the assets of the firm *pendente lite*, which includes the collection of its accounts, and to hold the same for the ultimate disposal thereof by the court according to the rights and priorities of all parties interested. He took no title to the property, and has no lien upon it. The title thereto remains, as it was before his appointment, in Davis & Michelbacher, subject to the control of the court. High on Receivers, sec. 5. Hence the receiver is not a necessary party to the creditors' suit to enable the appellants to establish, if they can, their prior right to the assets in his hands, or to obtain the appropriation thereof to the payment of their demands.

3. If, as charged, there was a valuable good-will pertaining to the business of the firm when the receiver was appointed, which he might and ought to have sold, but which he suffered to be lost, the court, by a proceeding in the partnership suit, will hold him to account for its value, and order the same paid to the person who shows the paramount right to the money.

4. A proceeding for the removal or suspension of the receiver must necessarily be taken in the case in which he is receiver.

5. We are strongly pressed to determine whether the

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transaction set out in the complaint in the proposed creditors' suit constitutes a voluntary assignment for the benefit of creditors, with preferences to the persons to whom the judgment notes were given. But we do not reach that question, for, in the view we have taken of the case, it is immaterial on this appeal which way the question is answered. Hence we leave it undetermined.

It follows from the foregoing views that the refusal of the county court to grant leave to sue the receiver was not an abuse of its discretion.

By the Court.— Order affirmed.

McKeigue, Administratrix, etc., Respondent, vs. The City of Janesville, Appellant.

December 22, 1886 — January 11, 1887.

Highways: Muncipal Corporations. *(1) Defective highway: Notice of injury causing death. (2) Pleading: Pecuniary loss to children from death. (3, 4) Evidence: Expressions of pain: Ill health of dependent children. (5) Mayor as attorney against city. (6) When notice to alderman notice to city. (7) Annuity tables. (8) Contributory negligence: Knowledge of danger.*

1. If a person injured by reason of the insufficiency or want of repairs of a highway dies within ninety days, the fact that the notice required by sec. 1339, R. S., was not given, does not defeat an action brought by the administrator under sec. 4255, R. S. It is not necessary in any case for the administrator to give such notice.
2. A complaint stating that plaintiff's intestate was a widow at the time of her death, and that three of her children, being of the ages of thirteen, eleven, and nine years respectively, were dependent upon her for their support, nurture, and education, is *held* to show sufficiently that such children suffered a pecuniary loss by her death.
3. Where the death of plaintiff's intestate is alleged to have resulted from injuries caused by defendant's negligence, testimony as to the

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expressions of pain uttered by the deceased at the time she claimed to be injured, and from that time to her death, and indicating where such pains were located, is admissible.

4. Evidence that some of the younger children of plaintiff's intestate were in poor health is competent as tending to show that her death was a pecuniary loss to them especially. So, also, evidence tending to show that the children had no means of support of their own is admissible.

5. Though after the commencement of an action against a city, the plaintiff's attorney becomes mayor of the city, he may still appear for the plaintiff on the trial of the action.

6. Where by a city charter the common council has "control and power over and management of" all streets, notice to a member of the council of a defect in a street is notice to the city itself.

7. In an action to recover damages for the death of a person, annuity tables are admissible in evidence as tending to show the number of years the deceased would probably have lived.

8. The fact that a person who was injured while passing over a defective cross-walk knew of the defect and that there was some risk in so passing, and might easily have gone around the dangerous place, does not, as matter of law, establish contributory negligence.

APPEAL from the Circuit Court for *Rock* County.

The principal facts are stated in the opinion. The sixth assignment of error there referred to was based upon the ruling of the court below in permitting the plaintiff to prove that after the death of the mother the younger children were entirely supported by their older brothers and sister.

There was a verdict for the plaintiff for $1,750. A motion for a new trial was denied, and from the judgment entered on the verdict the defendant appealed.

Charles E. Pierce and *William Smith*, for the appellant.

John Winans and *Ogden H. Fethers*, for the respondent.

TAYLOR, J. This action was brought to recover damages of the appellant for causing the death of Bridget McKeigue by the negligence of the city in not keeping in repair a cross-walk in said city. The claim made by the respondent is that on the 14th day of April, 1883, Bridget McKeigue,

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while crossing one of the public streets in said city on a dark and rainy evening, was violently thrown down by reason of a defect in the cross-walk where the walk crossed the gutter; that she was greatly injured by her fall, and that, by reason of such injury, she became sick, and so remained until her death, which occurred on the forty-ninth day after her alleged injury.

That the deceased fell on the cross-walk at the place indicated in the complaint is fully established by the evidence. That her fall was occasioned by a defect in the cross-walk existing at the time is also well established, and is not seriously controverted. All other material facts in the case are controverted by the learned counsel for the appellant in a very able and exhaustive printed brief, as well as by a forcible oral argument on the hearing of this appeal. It was contended that there was not sufficient evidence showing that the city authorities had any knowledge of the alleged defect in the cross-walk. Admitting that there was any such defect, it is denied that the deceased was injured by her fall on the walk, as claimed by the respondent. It is denied that, if she was injured, there is any evidence in the case sufficient to justify the finding of the jury that her death was caused by such injury.

After listening to the arguments of the learned counsel and reading the evidence in the case, we are satisfied that there is sufficient evidence to sustain the findings of the jury that the cross-walk was defective; that the deceased fell upon the walk by reason of such defect; that she was injured by such fall; that such injury caused her death; and that the appellant had notice, either in fact or by reason of the long continuance of the defect in the walk, before the accident happened. It was strongly urged upon us by the learned counsel for the appellant that, upon a full consideration of all the evidence, we would find that there was not sufficient evidence to sustain the verdict upon these

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points, and especially that the weight of evidence was clearly against the finding that the injury received by the deceased by falling from the cross-walk caused her death. In reply to this argument we have only to say that it is clear that there was evidence upon each and all the controverted points which compelled the circuit judge to submit all these controverted issues to the decision of the jury, and that to have done otherwise would have been error on the part of the trial court. Upon an examination of the record we are satisfied that there is no such clear preponderance of the evidence against the findings of the jury upon the disputed issues as would justify this court in setting aside the findings as unsupported by the evidence, against the opinion of the learned circuit judge who denied a motion for a new trial, and the judgment must be affirmed unless the trial court has committed some error in his rulings at the trial.

We will now consider the other errors assigned by the appellant.

1. The first error assigned is that the complaint does not state facts sufficient to constitute a cause of action. This objection was first taken by demurrer, which was overruled by the court, and afterwards by objection to any evidence being received on the trial in support of the complaint, which was also overruled. It is urged that there are two defects which are fatal to the complaint:

First, that notice of the injury to the deceased was not given to the city authorities by her during her life-time, nor after her death until more than ninety days after the injury occurred, as required by sec. 1339, R. S. 1878. We are very clear that, when the death of the party injured occurs within ninety days after the injury, the fact that the deceased has not given the notice required by the statute does not defeat the action brought by the administrator under the provisions of sec. 4255, R. S., and that it is not

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necessary in any case that the administrator should give the notice required by sec. 1339, R. S., in order to maintain an action under said sec. 4255. The language of sec. 1339 very clearly contemplates that the party who shall give the notice required by that section is the party injured. In fact, no one can maintain an action under said section other than the party injured. If the party injured die before judgment rendered in his favor, all right under that section is lost. See *Randall v. N. W. Tel. Co.* 54 Wis. 140; *Meese v. Fond du Lac*, 48 Wis. 323. It is evident, therefore, that the right to maintain the action for causing the death of Mrs. McKeigue is not given by said sec. 1339, but depends solely on the provisions of said sec. 4255, R. S. This section provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages," etc.

It will be seen that the right to maintain this action for an injury causing the death of a party depends upon two things: First, that the death of the party was caused by the neglect or default of the defendant; and such neglect or default was such that, had the person injured lived, he could have maintained an action against the defendant for such injury. Now, it is evident from the facts found in this case that the neglect of the defendant caused the death of Mrs. McKeigue, and that the deceased, at the time of her death, could, had she lived, have maintained her action against the defendant city. She had ample time to give her notice, had she lived, as required by sec. 1339, R. S.; and, in the language of the statute, she might, had she lived longer, have maintained such action. We think sec.

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4255 must be construed as giving the right of action to the administrator whenever the death occurs at such a time as would have enabled the deceased, had he or she lived longer, to have complied with sec. 1339, and so have maintained such action. Any other construction would destroy all right of action, under said sec. 4255, against towns, cities, villages, or counties under said section, when death followed immediately on the happening of the accident. In such case the party dying could not, at the time of the death, have maintained an action, because no notice had then been given as required by the statute; and sec. 4255 gives the action to the administrator only when an action could have been maintained by the deceased.

If the deceased had lived until after the expiration of the ninety days given by statute within which to serve the notice on the town, etc., and no notice had been served as required by law, and afterwards had died, it may be that a different rule would be applied. In such case the deceased could not have maintained an action had he or she continued to live longer; and possibly, under sec. 4255, no action could in that case be maintained by the administrator. We do not, however, pass upon this question, as it is not involved in this case. See *Parish v. Eden*, 62 Wis. 272, 287.

The cases cited by the counsel for the appellant, in Massachusetts, *Taylor v. Woburn*, 130 Mass. 494, and *Madden v. Springfield*, 131 Mass. 441, which seem to hold that the notice required to be given by the statutes of that state may be given after the death of the party injured and within the time limited by law, are not applicable under our statute. By the statutes of Massachusetts, an action for an injury to the person survives, and the administrator in such action maintains the action in the right of the deceased person, and recovers damages as though he had survived. See Pub. Stats. Mass. 1882, p. 958. Under the law

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of that state the administrator stands in the place of the deceased, and recovers for the benefit of his estate. Under our law there is no such relation between the deceased and the person who brings the action.

Second. The learned counsel insist that the complaint is bad because it does not state facts which show that the children of the deceased suffered any pecuniary loss by the death of their mother. The complaint shows that the deceased was a widow at the time of her death; that she left surviving her eight children, ranging from the ages of twenty-five years down to seven years; and it further alleges that three of the younger children, being of the ages thirteen, eleven, and seven years, were dependent upon her for their support, nurture, and education. We think the facts stated show that the three children named in the complaint as being of the ages of thirteen, eleven, and seven years suffered a pecuniary loss by the death of their mother. We think the allegation that the younger children were dependent upon her for support and nurture and education should be construed to mean that she, while living, furnished them with support, nurture, and the means of education, which were lost to them by her death. The complaint is sufficient under the ruling of this court in the case of *Kelly v. C., M. & St. P. R. Co.* 50 Wis. 381, and states a cause of action under the statute.

2. The second error assigned is that the mayor of the defendant city was permitted to appear on behalf of the plaintiff in the action. It appears that Mr. Winans had been employed as one of the attorneys for the plaintiff in the action a long time before he was elected to the office of mayor. Under the circumstances, we see no impropriety in his performing a service he had contracted to perform for the plaintiff before he held the official relation to the city which he held at the time of the trial. Certainly he would not have been justified in assisting to defeat his client

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in her action because of his subsequently acquired relations to the city, and we know of no rule of law or ethics which made it incumbent on him to withdraw his legal services from the plaintiff on account of his official position. We think he could not rightfully do so without her consent. We do not think the official position of Mr. Winans, under the circumstances, could have prejudiced the city in the trial of the action.

3. The third error assigned is that the court erred in permitting the plaintiff to prove the expressions of pain uttered by the deceased at the time she claimed to have been injured, and from that time down to her death. We think this evidence was clearly admissible. The learned circuit judge excluded all the statements made by the deceased as to the cause of her pains or injuries, and simply permitted the witnesses to testify as to her expressions of pain and suffering, and to indicate the place where such pains were located. To this extent we think the declarations of the deceased were admissible. See *Quaife v. C. & N. W. R. Co.* 48 Wis. 513, 524; *Gray v. McLaughlin*, 26 Iowa, 279; 1 Greenl. Ev. § 102, and cases cited in notes; *Matteson v. N. Y. C. R. Co.* 62 Barb. 364, 376; *Caldwell v. Murphy*, 11 N. Y. 416; *Fay v. Harlan*, 128 Mass. 244; *Barber v. Merriam*, 11 Allen, 322; *Insurance Co. v. Mosley*, 8 Wall. 397; *Bacon v. Charlton*, 7 Cush. 581; *Werely v. Persons*, 28 N. Y. 344.

4. It is alleged that it was error to permit the plaintiff to prove that two of the younger children were in poor health. We think this was competent, as tending to show that the loss of their mother was a pecuniary loss to them especially. It was competent on the question of damages. Because incidentally, under the statute, the other children might be benefited by this evidence, furnishes no good reason for excluding it.

5. It is alleged that it was error to permit proof that one of the aldermen of the city had notice of the defect in the

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cross-walk before the accident happened. The city charter provides that the "common council shall have control and power over and management of all streets, alleys, lanes, and public grounds in said city," etc. This language of the city charter gives to the common council the same general powers and control over the streets of the city that the general laws of the state give to the supervisors of towns over the roads in their respective towns. See sec. 1223, R. S. 1878. The aldermen, with the mayor, compose the common council of the city.

In the case of *Jaquish v. Ithaca*, 36 Wis. 108, it was shown that notice of the defect in the highway had been given to the chairman of the town, who was one of the supervisors; and it was argued that such notice was not notice to the town. This court said: "Notice of the defect to that officer, who is one of the board charged by law with the care and superintendence of the highways and bridges in the town, is notice to the town; and if, thereafter, no proper precautions were taken in due time to guard against accidents by reason of such defects, the town is chargeable with negligence." The cases cited by the learned counsel for the respondent in their brief from other courts fully sustain the ruling of this court in the case of *Jaquish v. Ithaca.*

Independent of the evidence that notice had been given to one of the aldermen of the city of the defect in question, there was abundance of evidence in the case tending to show that the defect had existed for such a length of time that the city would be presumed to have notice of its existence without proof of actual notice.

6. This objection is similar in its nature to the fourth, and the evidence objected to was competent as tending to show that the children had no means of support of their own, and so would be dependent upon their mother if she was living.

7. The objection to the annuity tables, as tending to prove the probable number of years the deceased would

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have lived if the accident had not happened, was not well taken. This court held, in *Berg v. C., M. & St. P. R. Co.* 50 Wis. 427, and *Mulcairns v. Janesville*, 67 Wis. 24, that these tables were admissible in a case of this kind, not as forming a legal basis upon which the jury might determine the probable length of life of the deceased, but as evidence which the jury might consider, with all the other evidence in the case upon that point. The eleventh error assigned upon the instruction to the jury on this question of the annuity tables cannot be sustained. The learned judge did not direct the jury to base their finding upon these tables alone, but to consider them with the other evidence in the case. Upon the propriety of admitting annuity tables in evidence in cases of this kind, see the case of *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 554, and cases cited in the opinion.

8. It is assigned as error that the court refused to give the following instruction to the jury: "If the deceased, Mrs. McKeigue, knew of the defect, its extent and nature, when she attempted to pass over the walk in question, the plaintiff cannot recover in any event, unless you find that the deceased was passing along the walk carefully, thoughtfully, and prudently, with the intent to avoid the danger which was in the way. And if the deceased, at the time she attempted to pass over the walk in question, knew the same was dangerous and that she could not pass the same without risk of injury, and if she could, at the same time, easily have passed around the dangerous place so as to have avoided all danger, she cannot recover in this action." We think this instruction was properly refused, in view of what the learned circuit judge had said to the jury upon that subject in his general charge. The instruction requested would seem to require the deceased to have exercised the care indicated in the instruction requested, if she knew generally of the defect, though at the time she may, on account of the

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storm and darkness or other causes, have not had it in mind when she undertook to cross over it. The last part of the instruction asked was, we think, properly refused under any circumstances. Even though there may have been some risk of injury in passing over the defective walk, and although she might easily have passed around the dangerous place, these facts alone, being conceded, did not, as a matter of law, entitle the defendant to a verdict. It would still be a question for the jury whether she was guilty of contributory negligence in passing over the defective walk.

9. It is said that the learned circuit judge so instructed the jury that he excluded from their consideration whether the street was in a reasonably safe condition, and instructed the jury that the city would be liable although the street in question was in a reasonably safe condition. After a careful reading of the instruction referred to by the learned counsel, we cannot find that such an instruction was given. The instruction referred to by the learned counsel in their brief commences with this statement: "While the duty rested upon the city to keep this cross-walk in a reasonably safe condition for public use by day and night," etc. If the learned counsel mean by this exception to the instructions that the cross-walk in question might be defective and wholly out of repair and unsafe for public travel, and yet the street as a whole be reasonably safe, we would be inclined to differ with them on that proposition; but, if such was the claim, it was their duty to have called the attention of the learned circuit judge to that proposition, and have asked some instruction conveying that idea to the jury, if they wished to rely upon it as a valid legal proposition.

The tenth assignment of error raises the same question presented by the fifth. It was not error to instruct the jury that notice of the defect to one of the aldermen was notice to the city. The eleventh error was disposed of in connection with the seventh; and the twelfth error assigned

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was disposed of in connection with the eighth, and no further comment upon them is required here.

Holding, as we do, that upon all the material questions of fact the verdict of the jury is sustained by the evidence, and that there are no errors in the admission or rejection of evidence, in the instructions to the jury, or in the general conduct of the trial, it follows that there was no error in refusing to grant a new trial.

By the Court.—The judgment of the circuit court is affirmed.

See note to this case in 31 N. W. Rep. 303.—REP.

WHEREATT, Respondent, vs. ELLIS, Appellant.

November 6, 1886—February 1, 1887.

(1, 2) Judgment by default: Conditional order: Stay of proceedings: Appeal to S. C. (3) "Recovery of money only." (4) Interest: Pleading. (5) Vacating judgment: Terms: Discretion. (6) Appealable order.

1. The circuit court ordered that the answer be stricken out and that the plaintiff have judgment as upon default unless the defendant do certain things within a certain time. The defendant failed to comply with the conditions of the order, but, after the time limited for such compliance, appealed from the order. A stay of proceedings upon the order, *pending the appeal*, was afterwards granted by this court. The order was affirmed. *Held*, that upon the filing of the *remittitur* the plaintiff was entitled, at once and without notice or further order, to judgment as upon default, in pursuance of the original order.
2. This court having in such matters appellate jurisdiction only will not, on affirming such an order, give further time for the appellant to comply with its conditions, but will leave that matter to the discretion of the court having original jurisdiction.
3. Under subd. 1, sec. 2891, R. S., judgment may be entered by the clerk for the amount demanded in the complaint, in an action

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arising on contract for the recovery of money only, although the damages are unliquidated.

4. Where the plaintiff was entitled to interest on the amount due him from the time of the commencement of the action, he may include such interest in a judgment taken by default, although the damages were unliquidated and the interest was not specifically demanded in the complaint.

5. The relieving of a party from a judgment against him, under sec. 2832, R. S., and the terms upon which such relief shall be granted, are within the discretion of the trial court, and this court will not interfere unless there has been a manifest abuse of discretion.

6. An appeal will not lie from an order made by a judge at chambers.

APPEAL from the Circuit Court for *Trempealeau* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This action was commenced February 24, 1883. The defendant's demurrer to the complaint on the ground of insufficiency was overruled by the trial court; and the order overruling the same was affirmed by this court. 58 Wis. 625. The cause being remitted to the trial court and issue joined, the defendant was required to give his deposition "otherwise than as a witness on the trial," at the instance of the plaintiff, as prescribed by secs. 4096, 4097, R. S.; ch. 194, Laws of 1882; ch. 321, Laws of 1885; and having refused to do so, and upon affidavit showing the facts, and upon an order to show cause to the contrary served on the defendant, the trial court, July 2, 1885, ordered, in effect, that the motion of the plaintiff to strike out the defendant's answer and to give judgment against him as upon default or failure of proof be granted and allowed; that said answer be, and the same was thereby, stricken out; that judgment be rendered and entered therein in favor of the plaintiff and against the defendant as upon default, pursuant to the statute, unless the defendant, within twenty days from the date of the service of a copy of the order upon him or his attorney herein, appear before S. W. McCaslin,

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Esq., a court commissioner, at his office, at the time and place named, within the twenty days aforesaid, to be by the defendant designated, and of which time ten days' notice in writing should be served by him on the plaintiff's attorney herein, and then and there be examined and give his examination by deposition in the manner required of him by the subpœna and notice therefor, and unless the defendant should also, within ten days after service of a copy of the order, pay to the plaintiff's attorney the sum of $10 allowed as costs of this motion. A copy of that order was served on the defendant's attorney herein July 13, 1885. July 20, 1885, the time for serving notice of defendant's intention to be examined on behalf of the plaintiff as provided in said order of July 2, 1885, was, by stipulation, extended to and including July 27, 1885, provided the $10 costs should be paid when such notice should be served. July 22, 1885, the trial judge, upon due application by the defendant therefor, refused to fix the amount of an undertaking to stay proceedings pending an appeal to be taken from said order. July 24, 1885, the defendant appealed from said order of July 2, 1885, and gave the usual undertaking, in the sum of $250, for costs and damages on such appeal. July 28, 1885, a temporary stay of proceedings in the trial court upon the order, pending the appeal, was granted by a justice of this court in vacation. September 22, 1885, such temporary stay was made permanent, pending such appeal, upon giving the requisite bond, which was done. The order of July 2, 1885, was affirmed by this court, and the cause remanded for further proceedings. 65 Wis. 639. The *remittitur* thereon was filed in the trial court, June 8, 1886, and notice thereof served on the defendant's attorney, June 10, 1886.

Upon an affidavit stating the facts a judgment, as upon a default, was entered in the trial court, June 11, 1886, wherein it was, in effect, adjudged that the plaintiff recover

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of and from the defendant $2,893.45, the amount claimed in the complaint, with interest thereon since the commencement of this action, together with the further sum of $44.65 costs and disbursements, amounting in the whole to the sum of $2,938.10. June 12, 1886, the defendant served notice on the plaintiff's attorney of his willingness to comply with the conditions of the order of July 2, 1885, and designated June 22, 1886, as the time for so doing. That notice was immediately returned as unauthorized, and because the time limited in the order had expired, and the costs therein required had not previously been paid. June 15, 1886, the defendant obtained an order from the court to show cause, returnable June 17, 1886, why the judgment entered should not be set aside and vacated and the answer permitted to stand.

Upon the hearing of that motion, June 17, 1886, it was, in effect, ordered by the court that the said answer be permitted to stand as defendant's answer in the action, and the cause stand for trial, notwithstanding the striking out of the same, upon the condition that the defendant should, on or before June 22, 1886, pay to the plaintiff's attorney $10 costs of this motion, and the further sum of $10 costs allowed in the order of July 2, 1885, and the further sum of $10 taxed and allowed as the costs of the entry of said judgment, amounting in all to $30; and upon the further condition that the defendant appear and attend before said court commissioner at his office in Eau Claire, June 28, 1886, at 9 A. M., and from day to day thereafter as he might be lawfully required until his examination should be completed, and then and there be examined otherwise than as a witness on a trial, by deposition, at the instance of the plaintiff, as provided by the statutes above referred to; and it was therein further ordered, as a part of the terms and conditions of granting such order for the relief of the defendant, that the plaintiff may perfect his said judgment

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so entered by the taxation and entry therein of the costs of said action; that in case the defendant complied with such terms and conditions the said judgment should stand as security for any judgment that the plaintiff might thereafter recover herein; that the same might be docketed and remain and be enforced as such security, and that transcripts of the docket of such judgment might be taken and filed as provided by law; that in case the defendant failed or refused to perform in all respects the conditions of such order, then such judgment should stand and be enforced as the final judgment of the court herein the same as though such order had not been made. It was therein further ordered, at the request of the defendant, in effect, that he might at his option give a bond as security, instead of retaining said judgment as specified therein, upon his complying with such conditions.

Afterwards, on June 23, 1886, the defendant applied to the judge at his chambers upon the records and papers on file in the action, and affidavits, to permit him to comply with the order of July 2, 1885, on payment of $10 costs as thereby required, and giving to the plaintiff not less than ten days' written notice of the time and place in Eau Claire at which he would be examined before said commissioner other than as a witness on the trial, and, upon being so examined, to permit his answer to stand, and this cause to be at issue and for trial thereon; and, in the mean time, until further ordered, staying plaintiff's proceedings upon said order of June 17, 1886, for a period not exceeding twenty days; and, such application having been duly heard on defendant's motion, the same was denied by said trial judge at chambers, and the order denying the same was therein ordered to be filed and entered with the clerk of the trial court. June 25, 1886, the defendant appealed to this court (1) from said judgment entered June 11, 1886; (2) from the whole of the order of the court made June 17,

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1886, except the part which permits and requires the defendant to pay $10 costs of motion as a condition of being examined, and permits and requires him to be so examined, and the defendant's answer to stand, and this cause to be at issue thereon for trial; (3) from said order of said trial judge made at his chambers June 23, 1886.

For the appellant there was a brief by *Alexander Meggett*, attorney, and *W. F. Bailey*, of counsel, and oral argument by *Mr. Bailey*. They contended, *inter alia*, that judgment could not be entered by the clerk in this case. The phrase "for the recovery of money only" in subd. 1, sec. 2891, R. S., means for the recovery of a definite sum of money as such, and without calling upon the court to ascertain anything but the existence and terms of the contract by which it became due. *Tuttle v. Smith*, 14 How. Pr. 395; *Hemson v. Decker*, 29 id. 385. The judgment was irregular because the amount exceeded that demanded in the complaint. No claim for interest had been made. R. S. sec. 2886; *Marsh v. Fraser*, 37 Wis. 149; *Tyson v. Milwaukee*, 50 id. 90; *Zwickey v. Haney*, 63 id. 468.

Levi M. Vilas, for the respondent.

The following opinion was filed November 23, 1886:

Cassoday, J. The facts disclose no lack of vigorous contention. The cause has been pending for nearly four years without any trial being had upon the merits. This is the fourth time we have been called upon to determine some question of practice. But every party may, in the forms prescribed by law, insist upon what he conceives to be his strict legal rights. Courts can do no less than to patiently listen, carefully consider, and then determine according to the law and the facts.

1. The difficulty here apparently grows out of a misconception or inadvertence in relation to the order of July 2, 1885, and the effect of the appeal from it. A copy of that

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order was served on the defendant's attorney, July 13, 1885. That order in terms authorized the defendant to escape from its provisions by paying the costs of motion within ten days from the time of such service, and also, within that time, giving the plaintiff's attorney ten days' notice, in writing, of his willingness to submit to an examination before the commissioner, at a time to be fixed by the defendant, within twenty days from the time of the service of such copy. July 20, 1885, the time limited for the payment of such costs and giving such notice of submission was extended, by stipulation, to and including July 27, 1885. The appeal taken July 24, 1885, from the order of July 2, 1885, accompanied by an undertaking as required by sec. 3052, R. S., and ch. 49, Laws of 1883, did not operate as a stay of proceedings upon the order appealed from. The statutes expressly declare that, "when the appeal is from an order, the execution or performance thereof shall not be delayed, except upon compliance with such conditions as the court or the presiding judge thereof shall direct." Sec. 3060, R. S.; ch. 49, Laws of 1883. No such direction was given by the trial court or the presiding judge thereof. On the contrary, the trial judge expressly refused to fix the amount of any undertaking under that section, or stay proceedings on the order. Accordingly the time for paying such costs and giving such notice expired July 27, 1885.

July 28, 1885, a justice of this court granted a temporary stay, which this court subsequently made permanent, pending the appeal. This was, in effect, holding that the trial judge improperly refused to grant such stay. Nevertheless, it was a fact that no stay was granted until July 28, 1885, before which day the defendant's time for paying such costs and giving such notice of a willingness to submit to the terms of the order had expired by limitation. The result was that the defendant had, technically, lost the right of compliance with the conditions of that order before any

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stay thereon was granted. That stay was only during the pendency of the appeal, and necessarily terminated upon the filing of the *remittitur*. It in no way enlarged the time for compliance with the conditions of the order. This court, on that appeal, might possibly have imposed conditions upon such affirmance allowing the defendant further time for compliance. But whether it might or not is immaterial here, since it was not requested nor done, and the matter has become *res adjudicata*. These things being so, and the order of July 2, 1885, having in all respects been affirmed by this court (65 Wis. 639), it necessarily follows that upon filing the *remittitur* the order stood the same as though no appeal had ever been taken therefrom. The result is that, immediately upon the record being returned to the trial court, the plaintiff was technically entitled, as a matter of legal right, to judgment as upon default, in pursuance of the mandate of the order. Nor was it necessary to give notice to the defendant of such intended application for judgment, since the order for judgment had been made by the court after notice and hearing of the defendant. Whatever may be the rule elsewhere, under our practice there was no necessity for an additional order giving permission to execute the order which had already been made by the court.

2. Was the plaintiff, upon his complaint, entitled to the judgment which he did enter? The summons and complaint were personally served upon the defendant. The substance of the complaint was sufficiently stated on a former appeal. 58 Wis. 625. It was verified, and alleged a cause of action arising on contract for the recovery of money only, within the meaning of subd. 1, sec. 2891, R. S., as it has frequently been construed by this court. *Schobacher v. Germantown Farmers' Mut. Ins. Co.* 59 Wis. 90–92, and cases there cited. This being so, it was a proper case for entering judgment, as upon default, with the clerk.

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Besides, as indicated, there was an unexecuted order for judgment made by the court upon due notice and hearing.

3. Although the damages were unliquidated, yet the plaintiff was clearly entitled to interest on the amount due him from the time of the commencement of the action. Was he precluded from recovering such interest by his omission to pray specifically for the same in his complaint? The relief granted as upon a default cannot exceed that which is demanded in the complaint. Sec. 2886, R. S.; *Zwickey v. Haney*, 63 Wis. 464; *Edleman v. Kidd*, 65 Wis. 25. But the demand for judgment was for the amount due at the commencement of the action. If the plaintiff was entitled to the amount claimed as of that date, then he was entitled to interest thereon, as a matter of law, and hence it was unnecessary to allege the same as a fact. The complaint, therefore, apprised the defendant of the amount of the plaintiff's claim, and thereby secured the purposes of that section. Had the judgment included interest prior to the commencement of the action, and been entered upon an ordinary default, it would have been error. But this is different, since the interest included in the judgment accrued after the commencement of the action. This seems to be permissible. *Haven v. Baldwin*, 5 Iowa, 505. Besides, although the judgment is entered "as upon default," still it can hardly be regarded as a case without an answer, within the meaning of sec. 2886; for that contemplates a right of reliance, on the part of the defendant, that judgment will not be taken for an amount exceeding that which is demanded in the complaint. Here there certainly was no misplaced confidence in that regard. Manifestly, there should be no reversal in a case like this, where the judgment does not exceed the amount to which the plaintiff is legally entitled upon the facts stated in the complaint, as no substantial right of the defendant is thereby affected. Sec. 2829, R. S. See, also, *Hodge v. Sawyer*, 34 Wis. 397.

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4. The judgment having been regularly entered, the defendant could only have it opened as a matter of favor, and upon a proper application. Here the application was granted upon the conditions named in the statement of facts, the substantial portions of which were that the defendant should pay $10 each for three motions, including the one mentioned in the order of July 2, 1885, and submit to an examination as therein provided, and other things, some of which were at the request of the defendant It is to be remembered that the statutes make the granting of such motion a matter of discretion with the trial court, and upon such terms as may be just. Sec. 2832, R. S. This court has frequently held that it will not interfere in such case unless there has been a manifest abuse of discretion. *Smith v. Smith*, 51 Wis. 668; *Ray v. Northrup*, 55 Wis. 396; *Union Nat. Bank v. Benjamin*, 61 Wis. 514; *Jefferson Co. Bank v. Robbins*, 67 Wis. 68. Here we discover no such abuse in making the order of June 17, 1886. On the contrary, we think the terms imposed were reasonable.

5. An appeal will not lie from an order made by a judge at chambers. *Hubbell v. McCourt*, 44 Wis. 584; *Bunn v. Valley L. Co.* 63 Wis. 630. The order of June 23, 1886, was such an order, and no action of the court was taken thereon, and consequently it was not appealable.

By the Court.— The judgment of the circuit court is affirmed. That portion of the order of the circuit court made June 17, 1886, appealed from, is affirmed. The appeal from the order made by the judge at chambers June 23, 1886, is dismissed. The cause is remanded for further proceedings according to law.

Upon a motion for a rehearing it was contended, on behalf of the appellant: 1. No judgment in the action could be rendered upon the conditional order, except on motion to the court showing that the condition had not been complied

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with. *Sawyer v. Farmers' & M. Bank*, 7 Wis. 386. 2. Notice of the assessment of damages was necessary. *Douville v. Merrick*, 25 Wis. 688. The decision of this court upon the appeal from the order was in fact a new trial and decision of the question involved upon the appeal, and its judgment or decision was a new order or decision to take effect from the time of its being remitted to the court below. Therefore the defendant had the full time granted by that order, the same as if no appeal had been taken and this was the first order made in the premises. *Butler v. Mitchell*, 15 Wis. 360; *State v. Hæflinger*, 33 id. 594.

The following opinion was filed February 1, 1887:

CASSODAY, J. A careful reading of the briefs on motion for a rehearing fails to disclose any substantial reason for opening any of the questions determined in the opinion filed. In considering the effect in this court of the affirmance of a prior order on a former appeal, the writer there said on his own responsibility, and without any authority from the court, that "this court, on that appeal, might possibly have imposed conditions upon such affirmance allowing the defendant further time for compliance. But whether it might or not is immaterial here, since it was not requested nor done, and the matter has become *res adjudicata*. These things being so, and the order of July 2, 1885, having in all respects been affirmed by this court, it necessarily follows that upon filing the *remittitur* the order stood the same as though no appeal had ever been taken therefrom." The order of June 17, 1886, here appealed from, was "upon the condition that the defendant should, on or before June 22, 1886, pay to the plaintiff's attorney," in the aggregate, $30 costs, and also "upon the further condition that the defendant appear and attend before said commissioner at his office in Eau Claire, June 28, 1886, at 9 A. M., and from day to day thereafter as he might be lawfully re-

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quired until his examination should be completed, and then and there be examined," etc. The appeal from that order was not taken until June 25, 1886, which was three days after the time expired for the payment of such costs. We are now asked to give to the defendant the right to comply with its conditions, notwithstanding the time for such compliance had in part expired prior to such appeal. A similar question may arise whenever an appeal is not taken from an order overruling or sustaining a demurrer until after the time allowed therein for answering or amending has expired. Can this court grant such relief, upon an affirmance of such order? It was said by the late chief justice that "there is neither statute to authorize nor practice to sanction a discretion for a new trial upon affirmance. Such a discretion would virtually convert affirmance into reversal." *Stevens v. Sup'rs Clark Co.* 43 Wis. 41.

The real objection to this court granting such relief is the fact that in such matters it exercises "an appellate jurisdiction only." Sec. 2405, R. S. The statute prescribes that the court may, on motion and good cause shown, in its discretion, and upon such terms as may be just, allow any such proceeding to be taken in an action after the time limited by any order of the court *has expired.* Sec. 2831; *Morgan v. Bishop*, 61 Wis. 410; *Sup'rs Milwaukee Co. v. Pabst*, 64 Wis. 247. Application, in a case like this, under that section, must necessarily, in the first instance, be to the court of original jurisdiction, and not to the court which can "exercise an appellate jurisdiction only." As yet no such application has been made to the trial court. The mere fact that an order has been affirmed does not seem to have the effect of taking away the original jurisdiction of the trial court, in the exercise of a sound discretion, in a proper case, and upon good cause shown, and upon such terms as may be just, to allow a party to comply with the conditions of such order, notwithstanding the time for doing so

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has in part or wholly expired. As stated in the opinion filed, the affirmance of an order leaves it the same as though no appeal had ever been taken therefrom. The right of the trial court to authorize such compliance with its own orders after the time has so expired, in case there has been no appeal, would seem to be undoubted.

Some of the things said above by way of argument have respect to matters not legitimately before us, and may therefore be justly regarded as *obiter* and not binding upon the court; nevertheless, the history and character of this litigation has been such that we deem it for the interest of both parties, and not improper, to say what we have.

By the Court.— The motion for a rehearing is denied, with $25 costs.

FULLER & JOHNSON MANUFACTURING COMPANY (LIMITED), Respondent, vs. BARTLETT, Appellant.

December 16, 1886 — February 1, 1887.

PATENTS: EQUITY. *(1) Jurisdiction of state courts. (2) Invention by employee: Implied contract to assign: License. (3) Specific performance.*

1. A state court has jurisdiction of an action to compel the performance of a contract to assign the right to a patent for an invention, when both the parties, at the time of the contract, were residents of the state.
2. The superintendent of a manufacturing company, knowing its intention to perfect and put upon the market a new machine, voluntarily disclosed his conception of a device to be used in connection therewith, and, under the direction of the company and with its material and at its expense, voluntarily went to work to perfect such device and construct the machines and to aid in putting them upon the market. *Held*, that from such facts the law would not imply an agreement for the absolute assignment to the company of the patent for such device, but would imply an agreement for

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a license to the company to manufacture perpetually, at its then existing works, machines embodying such invention, and to sell them wherever it could find a market.

3. Equity will compel specific performance of such implied contract for a license.

APPEAL from the Circuit Court for *Dane* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This action is to enforce the specific performance of an alleged implied contract to assign to the plaintiff an invention made by the defendant while in the employment of the plaintiff, commenced March 8, 1885, and before procuring the patent. The answer, in effect, denied the making of any such contract, and alleged that the defendant was the sole inventor and the exclusive owner of the invention, and entitled to the exclusive use of it. On the trial it appeared from the undisputed evidence or the findings of the court, as matters of fact, in effect, that in 1879 and 1880 the defendant was in the employment of Walter A. Wood Mowing & Reaping Machine Company, in the business of which the then firm of Fuller & Johnson, composed of M. E. Fuller and John A. Johnson and at least two other large stockholders of the plaintiff, were interested and had a share of the profits and a large supervision and direction of the defendant's services; that during said time the defendant invented a grasping device, and voluntarily applied the same to the reaping and binding machines then being manufactured by the said Walter A. Wood Mowing & Reaping Machine Company; that in a conversation with said Fuller & Johnson as to his right to a patent and the ownership of said grasping device, the defendant was informed by them, in substance, that he had no such ownership or right, inasmuch as the device was invented and made by him while in that company's employment, pursuant to their direction, and with their time, materials, and the service of other em-

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ployees of said company; that said Fuller & Johnson continued ever since to entertain the same views; that September 14, 1880, the defendant, with full knowledge of the views so entertained by the said firm of Fuller & Johnson, and acquiescing in the same, entered into an agreement in writing with the said firm of Fuller & Johnson, whereby he agreed to work for them, or any one else they might designate, "at selling, settling and collecting for, and setting up, starting, and repairing, harvesting machines, . . . and for that purpose agreed to go to any place designated by" them, "at any time in the month of October, and continue for one year;" for the faithful performance of such service, the said firm agreed therein to pay him $1,400 for one year, and at that rate, and to pay all his necessary traveling expenses while away from home; that the defendant remained in such employment until in February, 1882, when he was directed by Fuller & Johnson to come to Madison and take the position of superintendent of their works engaged in the manufacture of agricultural machinery, but at the same salary, which he did; that during such employment the defendant and said Johnson invented a ratchet to the mowing machine of said firm, and the said firm procured a patent therefor at the expense of the firm in the joint names of the defendant and said Johnson, and the same was assigned by both of them to the firm, without any objection from either; that August 6, 1883, the defendant gave notice of his resignation as such superintendent, to take effect October 1, 1883, and the same was accepted August 23, 1883; that in September, 1883, the defendant was induced by said firm to withdraw such resignation and consent to a re-employment as such superintendent at a salary of $2,000 for one year, and at that rate; that it was the purpose of said firm in effecting such re-employment, and it was then agreed by and between the defendant and said firm, that they would bring a new mower into the market,—

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a marketable machine,—as good, if not superior, to any other machine in the market, not only in workmanship but in improvements; that January 19, 1884, the said Fuller & Johnson Manufacturing Company was duly and lawfully changed to the plaintiff corporation; that, in the spring of 1884, John A. Johnson of said firm, and then president of the plaintiff company, conceived a plan for a tilting shoe on said mower, and directed the defendant, as such superintendent, to carry it out, which he did, and completed a machine which worked very well, but not to the satisfaction of the company; that at a meeting of the executive committee of the plaintiff (of which the defendant and said Johnson were members), in May, 1884, as before, the defendant opposed the application to such mower of any tilting device or shoe, claiming that it would not improve the machine, but suggested that he had an idea of one in his mind which he thought was superior to Johnson's device, and would apply it rather than to have Johnson's device made, as he thought it would work better; that the defendant then explained his idea to the committee or board as well as he could without drawings; that the committee were reluctant to take hold of it, as the plaintiff had already been to a good deal of expense; that Johnson disapproved of it; that finally the committee concluded to make one machine according to the defendant's idea, and directed the defendant to do so; that the plaintiff, at the request of the defendant, sent for and bought a certain mower, with a tilt upon it, to aid the defendant in getting up such invention; that the defendant, at the request of the plaintiff, then directed the plaintiff's draughtsman to make the necessary drawings, and the plaintiff's pattern-makers to make the necessary patterns; that such drawings and patterns were, from time to time, submitted to the other members of the committee, who made suggestions in relation thereto; that finally a machine embodying the defendant's invention was

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completed, in July, 1884, and was found to operate well; that the plaintiff expended in the construction of said machine, and twenty-five or thirty trial machines,— including drawings, patterns, templets, forms, flasks, files, dies, tools, etc., for the manufacture of such machines, from $3,000 to $5,000; that such machine and such drawings, patterns, dies, etc., were made wholly from materials belonging to the plaintiff, by the defendant and other workmen in the employment of the plaintiff, and during business hours and the time they were respectively paid for by the plaintiff, and for the purpose of perfecting a mower to be thereafter manufactured by the plaintiff; that the defendant so disclosed his idea or conception, and did and consented to do the other things mentioned, with full knowledge on his part that the plaintiff was making such expenditures with the expectation and belief that such invention would be the property of the plaintiff and that it would have the perpetual right to continue such manufacture of such machines; and that during all of said time, and down to January, 1885, the defendant acquiesced in and admitted such rights of property in said invention in the plaintiff; that in September, 1884, and in pursuance of such understanding and agreement between the plaintiff and defendant, the plaintiff, with the consent and co-operation of the defendant, did make application to its patent attorneys in Chicago to procure for the plaintiff letters patent from the United States upon said invention in the name of said defendant; that at that time the defendant, at the request of the plaintiff, prepared a claim for such patent, which was sent by the plaintiff to its said patent attorneys; that at the same time the plaintiff wrote said patent attorneys to prepare and forward to it an assignment, to be made by the defendant to the plaintiff, of such invention and patent; that the plaintiff continued to press such application for a patent in its own interest, until within a few days prior to

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the time when the defendant resigned his position as its superintendent, March 1, 1885, without knowing that the defendant had claimed such patent in his own right, which he did to said attorneys in January, 1885; that the defendant refused to execute such assignment February 14, 1885; that the defendant paid to said patent attorneys, towards the expense of procuring said patent, $60, which the plaintiff had tendered to him, but which he refused to accept; that the defendant is a nonresident of Wisconsin.

As a conclusion of law, the court found, in effect, that the plaintiff was entitled to judgment directing the defendant to assign said invention and patent to the plaintiff on payment to him, or in trust for him in case of his absence from the state, of said $60 so advanced to said attorneys; that, in case of his failure to execute such assignment, and his continuance out of the jurisdiction of the court, then that the plaintiff have judgment decreeing the same, with costs to be taxed. From the judgment entered thereon, in favor of the plaintiff and against the defendant, the defendant appeals.

Rufus B. Smith, attorney, and *S. U. Pinney*, of counsel, for the appellant.

For the respondent there was a brief by *Stevens & Morris*, and oral argument by *Mr. Stevens*.

Cassoday, J. The power to promote the progress of science and the useful arts, by securing for limited times to inventors the exclusive right to their respective discoveries is vested in Congress. Sec. 8, art. I, Const. of U. S. They have enacted, in effect, that any person who has invented or discovered any new and useful machine or improvement thereof, not known or used by others before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may obtain a pat-

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ent therefor. Sec. 4886, R. S. of U. S. But notwithstanding the fact that the right of the inventor is thus secured by act of Congress, and the further fact that the circuit courts of the United States have original jurisdiction of all suits at law or in equity arising under the patent laws of the United States (subd. 9, sec. 629, R. S. of U. S.), yet the jurisdiction of the state court in this case is unchallenged and unchallengeable. The case involves no question as to the identity of the inventor, nor as to the validity or infringement of any patent that has been or may be issued to secure a monopoly of the invention. The action is based upon the breach of an alleged contract between parties, both of whom at the time resided in this state, to assign the right to the patent for the invention. In this case there can be no question but what the state court properly took jurisdiction. *Nesmith v. Calvert*, 1 Wood. & M. 34; *Hartell v. Tilghman*, 99 U. S. 547, and cases there cited. It is like an action for the specific enforcement of a contract for the sale or lease of land the title to which is held by patent from the United States. *Ibid.*

Before any inventor or discoverer can receive a patent for his invention or discovery, he must make application therefor in writing. Sec. 4888, R. S. of U. S. The applicant must make oath that he verily believes himself to be the original and first inventor or discoverer of the machine or improvement for which he solicits a patent. Sec. 4892. The specification and claim must be signed by the inventor. Sec. 4888. It stands confessed that the defendant was the inventor of the tilting device in question. Of course, every patent, or any interest therein, is assignable in law by an instrument in writing. Sec. 4898. But the defendant had obtained no patent at the time this action was commenced. Patents may, however, be granted and issued to the assignee of the inventor or discoverer, but the assignment must first be entered of record in the patent office; and in all cases of an application by an assignee for the issue of a patent, the

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application must be made, and the specification sworn to, by the inventor or discoverer. Sec. 4895.

Under these statutes, it is apparent that such assignee can get no patent until he has first obtained an assignment thereof from the inventor or discoverer and complied with the conditions thus prescribed. Of course, neither the inventor nor his assignee has any exclusive right to the invention until a patent therefor has been issued; but the inchoate right to such exclusive use is vested in the inventor as soon as the invention is completed, and he may sell and assign the same, even before a patent therefor has been issued, and then the patent may issue to him or his assignee upon compliance with the statute. *Gayler v. Wilder*, 10 How. 493; *Railroad Co. v. Trimble*, 10 Wall. 379; *Hendrie v. Sayles*, 98 U.S. 546. Such assignment may not only be valid as to an existing invention, but may be broad enough to include a subsequent invention. *Railroad Co. v. Trimble, supra; Nesmith v. Calvert*, 1 Wood. & M. 39–44; *Continental Windmill Co. v. Empire Windmill Co.* 4 Fish. Pat. Cas. 428; 8 Blatchf. 295; *Wilkens v. Spafford*, 3 Ban. & A. 274; *Hammond v. M. & H. O. Co.* 92 U. S. 724.

It is here claimed, in effect, that the plaintiff expended several thousand dollars in perfecting the device in question and bringing it into public use, upon the faith of an implied contract with the defendant that he would, upon completion, assign to the plaintiff such invention and his right to letters patent therefor, but which he refused to do after being duly requested. This suit is brought to enforce the specific performance of such implied contract. It is a general rule that equity will not enforce specific performance when there is an adequate remedy at law. This court has, however, sanctioned the enforcement of a specific performance of an oral contract to execute a lease, in a case where such adequate remedy was not apparent. *Seaman v. Aschermann*, 51 Wis. 678; 57 Wis. 547.

In *Appleton v. Bacon*, 2 Black, 699, both parties claimed

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title to the invention as the assignee of the inventor, North. The suit was to restrain Bacon, who had obtained letters patent for the invention dated August 10, 1858, from manufacturing, using, or selling machines embodying the invention, and for the surrender, delivering up, and cancellation of the patent, and for general relief. The principal contention was whether the invention was made by North while in the employment of Bacon or his assignor, or subsequently and while he was in the employment of the Appletons. The supreme court, reversing the decree of the trial court, found, as a matter of fact, that North made the invention after quitting the service of Bacon and while in the service of the Appletons, and accordingly remitted the cause with instructions to enter a decree for the plaintiffs, as the assignees of North, directing the defendant to surrender the patent for cancellation.

In *Binney v. Annan*, 107 Mass. 94, a bill to compel the specific performance of a contract to procure a patent and then assign it to the plaintiff, was held good. The same principle has been repeatedly sanctioned. *Continental Windmill Co. v. Empire Windmill Co., supra; Wilkens v. Spafford*, 3 Ban. & A. 274; *Andrews v. Fielding*, 20 Fed. Rep. 123; *Hapgood v. Rosenstock*, 23 Fed. Rep. 86.

In this last case a bill for the specific performance of a contract with the inventor was maintained against a subsequent assignee of the patent with notice, and the court observed that, "although equity does not, as a general rule, decree specific performance of contracts relating to personal property, yet, ordinarily, adequate compensation in case of a breach may be obtained by way of damages at law. . . . Agreements for the assignment of a patent, and for delivery of chattels which can be supplied by the vendors alone, and for renewals of leases, are among those which will be specifically enforced." To the same effect is *Slemmer's Appeal*, 58 Pa. St. 155.

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Such being the law, and there being no claim in this case, nor any ground for claiming, that there was any express contract on the part of the defendant to assign to the plaintiff the inchoate right to the invention, the question recurs whether, upon the facts stated, the law implies such a contract.

In the leading case of *McClurg v. Kingsland*, 1 How. 202, one Harley, in October, 1834, while in the employment of the defendants at their foundry at Pittsburgh, and after numerous experiments made therefor in said foundry wholly at the expense of the defendants, who increased his wages on account of the useful result, invented the improvement patented March 3, 1835, upon an application made February 17, 1835, and assigned the same to the plaintiffs, March 16, 1835, in pursuance of an agreement made with them in the January before. From the time of completing the invention, in October, 1834, until February, 1835, Harley remained at work in said foundry as such employee of the defendants, engaged in the manufacture of machines for them embodying such invention, without any objection or claiming any compensation for such use, and during the time proposed that they should take out a patent therefor and purchase his right, which they declined. In that suit, brought by the plaintiffs, as the assignees of the patent to Harley, against the defendants for the infringement of the same, it was held, in effect, that the facts stated justified the presumption of a license from Harley to the defendants to so use the invention, and that the plaintiffs took their assignment subject to such license. In that case stress was laid upon sec. 7 of the act of Congress of 1839, analogous to sec. 4899, R. S. of U. S., which provides that "every person who purchases of the inventor or discoverer, *or with his knowledge and consent constructs*, any newly invented or discovered machine or other patentable article, *prior to the application by the inventor or discoverer for a patent*, or who

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sells or uses one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor." It was there said by the court, in effect, that one of the objects of the section was "to protect the person who has used the thing patented, by having purchased, constructed, or made the machine, etc., to which the invention is applied, from any liability to the patentee or his assignee;" and that it "puts the person who has had such prior use on the same footing as if he had a special license from the inventor to use his invention, which, if given before the application for a patent, would justify the continued use, after it issued, without liability." It was there contended that such protection was "confined to the specific machine," etc.; "but," observed the court, "we think that the law does not admit of such construction, whether we look at its words or its manifest objects, when taken in connection with former laws and the decisions of this court in analogous cases." The court concluded by saying: "We therefore feel bound to take the words, 'newly invented machine, manufacture, or composition of matter,' and 'such invention,' in the act of 1839, to mean the '*invention patented*,' and the words 'specific machine' to refer to '*the thing as originally invented*,' *whereof the right is secured by patent;* but not any newly-invented improvement on a thing once patented. The use of the invention before an application for a patent must be the specific improvement then invented and used by the person who had purchased, constructed, or used the machine to which the invention is applied." But while such specific license may be inferred from the mere construction of machines embodying the invention with the knowledge and consent of the inventor, prior to his application for a patent, yet this does not exclude the acquisition of a higher and more extended right by contract between the parties. Such presumption of license found in *McClurg v. Kingsland*,

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supra, has frequently been sanctioned in other cases. *Whiting v. Graves*, 3 Ban. & A. 222; *Chabot v. American B. H. & O. Co.* 6 Fish. Pat. Cas. 71; *Hapgood v. Hewitt*, 119 U. S. 226, affirming *S. C.* 11 Fed. Rep. 422, 11 Biss. 184.

In the light of these authorities, as well as reason, it is safe to conclude that, upon the facts stated, the law implied an agreement for a license from the defendant to the plaintiff to manufacture perpetually, at its present works, machines embodying the invention in question, and to sell the same wherever it could find a market. The very object of the plaintiff in employing its workmen, including the defendant, in making drawings, patterns, forms, flasks, files, dies, tools, machinery, etc., and in expending money experimenting with such machine, and in bringing the same into the market and introducing the same to the trade, was apparently to secure a machine as good as, if not superior to, any other, and then to continue the manufacture and sale of the same. All this must necessarily have been in the contemplation of the defendant as well as the plaintiff. Knowing such purpose, he voluntarily disclosed his conception of the invention in question. Knowing such purpose, he, under the direction of the plaintiff and with its material and at its expense, voluntarily went to work to perfect and construct such machines and to aid in putting them upon the market. But all these facts point to the manufacture by the plaintiff at its works, and then sales by it. They do not clearly and definitely point to the inhibition of such manufacture and sale by some one else, in some distant state,—as Maine, Texas, or Oregon. A patent not only gives a right to manufacture and sell, but secures to the inventor and those having rights under him the exclusive monopoly in the invention. Such monopoly extends to each and every portion of our common country. It excludes all persons from such right, unless they first acquire it from the inventor. While the facts disclosed are sufficient to support such affirmative

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rights in the plaintiff, they are barren of anything to negative all the rights of the defendant as the inventor. Stress is laid upon the fact that the defendant assigned to Fuller & Johnson an earlier patent. It may be that he did so without knowing his legal rights. It may be that he did not comprehend his legal right to the invention in question until about the time of his quitting the plaintiff's employment. Still, the question presented is whether the facts disclosed raise an implied agreement to assign the patent to the plaintiff absolutely. This is not to be inferred from the mere passivity of the defendant. In the case of *Whiting v. Graves*, *supra*, patents for a number of inventions made by the employee under circumstances similar to those here disclosed, were issued to his employer, to whom the right in the inventions had been assigned by the employee at or before the times of making the applications. Subsequently the employee, during such employment, made another invention, which, before application for a patent, he assigned to his employer upon a verbal agreement that the latter should pay the expenses of the patent for one half interest in it, which he did, and obtained a patent in his own name, and then filed a bill in equity against the defendant, to whom the employee had assigned his equitable interest in the patent, for infringement; but it was held that the defendant had an equitable right to one half of the patent, which constituted a good defense. The mere fact that, in making the invention, an employee uses the materials of his employer, and is aided by the services and suggestions of his co-employees and his employer in perfecting and bringing the same into successful use, is insufficient to preclude him from all right thereto as an inventor. The same is true of an invention conceived wholly by an employer, and then perfected under his supervision by aid of the mechanical skill and suggestions of his employees. These propositions are sanctioned by numerous adjudications. *Agawam Co. v.*

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Jordon, 7 Wall. 602, 603; *Collar Co. v. Van Dusen*, 23 Wall. 563, 564; *Blandy v. Griffith*, 3 Fish. Pat. Cas. 615, 616; *King v. Gedney*, 1 MacArthur Pat. Cas. 444.

The difficulty with the contrary assumption arises from confounding the machine with the invention it embodies. Of course there must be a machine which will operate before it can be patented. That implies material, workmanship, and skill combined. But such combination of itself is not enough to secure a patent. It must also embody an original conception of a new and useful method of doing a specific thing. It is this conception so embodied, evolved from the inventive faculties of the defendant, which constituted the invention in question. The law gave to him the exclusive property in it. He still retains it, except in so far as he has parted or agreed to part with it. The material, workmanship, and skill which embodied that conception remained the property of the plaintiff. But workmanship and skill are both the result of instruction, experience, and knowledge. They are acquired by being learned. They may aid and stimulate invention, but are no part of it. An invention, to be patentable, must not only *originate* with the inventor, but must be *new* and useful.

The question remains whether the plaintiff, as such licensee, is entitled to any relief in this action. In the very recent case of *Hapgood v. Hewitt*, *supra*, the bill of complaint was substantially like the one at bar, except as hereinafter mentioned, and sought to compel an assignment of a patent by the employee to the successors of the employer. A demurrer thereto for want of equity was sustained, and thereupon a decree was entered dismissing the bill, and the same has just been affirmed by the unanimous opinion of the supreme court of the United States. It was there held that Hewitt, as such employee, took the legal title to the patent in his own right and not as trustee for his employer, and that the latter at most had a mere license to manufact-

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ure; that, as such license would be a perfect defense to an action at law for the infringement of the patent, relief in equity was properly denied and the bill properly dismissed. To the same effect is the case of *Joliet Manuf'g Co. v. Dice*, 105 Ill. 649. The case of *Hapgood v. Hewitt* is, however, distinguishable from the one at bar in the following particulars: At the time of making the invention, Hewitt was in the employment of "Hapgood & Co.," then a Missouri corporation. After the dissolution of that corporation, the suit was commenced by the *trustees* of that *dissolved* Missouri corporation, and the "Hapgood Plow Company," an Illinois corporation, as its successor, against Hewitt; and it was held that such a license was not assignable, and that as the employer corporation had dissolved and its stockholders had formed a new corporation under the laws of a different state, the new corporation acquired no right under the alleged assignment to it. Such being the character of the complainants and the holding of the court, the question was not involved as to whether the employer of the inventor, as such licensee, might have maintained an action to enforce the specific performance of such agreement to license.

In *Wilkens v. Spafford*, 3 Ban. & A. 274, the employer contracted for the exclusive benefit of the employee's inventive faculties and inventions during his term of service, and an exclusive license for the use of the machines during the existence of the patents and any extensions, renewals, or reissues of the same, was decreed. In *Hapgood v. Rosenstock, supra*, the court, in speaking of the general rule of refusing equitable relief when there is an adequate remedy at law, observed: "It is apparent that such consideration cannot apply to an agreement like the present, because, from the nature of the subject matter, it would be impossible in many cases to ascertain the damages which licensees

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might sustain by reason of being deprived of their rights to use an invention;" and accordingly a purchaser of the patent was restrained from violating the terms of the agreement for the license. In *Slemmer's Appeal*, 58 Pa. St. 155, the action was brought by three of the partners against the other, who was the inventor, to compel an assignment of the patent obtained by the latter for his invention used by the firm, and made by him as a member of the firm and while engaged in the business of the firm. The trial court held that the patent belonged to the firm, and decreed accordingly. Although such decree was reversed, on the ground that the defendant, as the inventor, was the lawful owner of the patent in his own right, and the firm only entitled to a license to use the invention, yet it was held that the plaintiffs were jointly and severally entitled to such license, and the same was decreed accordingly. Such ruling seems to have been eminently just. There can be no other adequate remedy in a case like this.

The complaint is criticised mainly on the ground that it states the evidence, instead of alleging the facts. Such objection is not available on demurrer *ore tenus*, especially where, as here, the substance of the evidence is stated in the complaint, and then more fully proved upon the trial.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to render judgment in favor of the plaintiff and against the defendant to the effect that the latter execute and deliver to the former a license to manufacture machines embodying the invention in question at its present works, perpetually, and to sell the same anywhere in the market, free and clear from any and all liability for any fee, royalty, or otherwise, for or on account of any patent which has been or may hereafter be granted for said invention; and, in case of failure to so execute such license within a time to be named,

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then that such judgment stand as and for such license, and to have that effect; and for any other and further proceedings deemed necessary to make such judgment effectual.

COLE, C. J., took no part.

SMITH, Respondent, vs. THE SHELL LAKE LUMBER COMPANY, imp., Appellant.

January 11 — February 1, 1887.

Logs and lumber: Lien for labor: Purchaser without notice.

A lien for the amount due for labor performed in manufacturing logs into lumber cannot be enforced as against a *bona fide* purchaser of the lumber for value, who purchased before the filing of the claim for such lien and without notice, either actual or constructive, of the lien.

TAYLOR, J., dissents.

APPEAL from the Circuit Court for *Chippewa* County.

Action to enforce a lien upon certain lumber and shingles for the amount due for labor and services performed in the manufacture thereof. The facts are sufficiently stated in the opinions. The defendant *The Shell Lake Lumber Company* appealed from a judgment in favor of the plaintiff.

For the appellant there was a brief by *Marshall & Jenkins*, and oral argument by *Mr. Jenkins*.

For the respondent there was a brief by *Fayette Marsh* and *Clapp & Macartney*, and oral argument by *Mr. Clapp*.

ORTON, J. In 1883 and 1884 the plaintiff, with others, performed work and labor for the defendant Eugene Smith, and on his pine logs, by manufacturing therefrom a large lot of shingles. On the 5th day of April of the same year,

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1884, the plaintiff duly filed his claim for a lien on said shingles, and on the 11th day of April thereafter he brought his action against the defendant, and procured an attachment, and the attachment was duly served by levying upon said shingles, then being in the *possession* of the *Shell Lake Lumber Company*, on both sides of the side track of the railroad, and by the service of summons upon the said company. According to the stipulation of the parties and the finding of the circuit court, before the filing of said claim for a lien thereon, and without any notice or knowledge of the plaintiff's claim for a lien or of the existence of the indebtedness of the said defendant to the plaintiff on account of said work and labor, the said defendant sold and delivered a part of said shingles to one David Joyce, and the other part thereof to said *Shell Lake Lumber Company*, and they purchased the same of the said defendant in due course of trade, and paid the said defendant the purchase money thereof, and all of said shingles were so left in the possession of said company. These are all the facts necessary to raise the question upon which the judgment was rendered and the case is to be decided in this court; and that question is whether the lien of the plaintiff upon the shingles for his work and labor shall have preference of and be paramount to the right of the purchaser in such a case; or, in other words, whether in view of secs. 3329–3331, R. S., and the amendments thereto of 1880, 1881, and 1882, the lien of the laborer so attaches to the logs, timber, or lumber upon which he has performed labor and service, from the time such labor is performed, as to supersede the claim of a subsequent *bona fide* purchaser thereof for value before the filing of the claim for such lien, and having no notice or knowledge of such lien, express, implied, or constructive.

The solution of this question depends wholly upon the construction of our statute. It is a new question in this court. It was not involved in *Dobbs v. Enearl*, 4 Wis. 451,

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although the language in respect to the lien *not remaining* or continuing unless the claim is filed within the time prescribed in sec. 4, ch. 120, R. S. 1849, that "no such debt for work and materials *shall remain* a lien upon such lands, houses, or other buildings longer than one year," etc., "unless a petition or claim for the same be filed," etc., is the same as in sec. 3331, R. S., as amended, which is that "no debt or demand for such labor or service *shall remain* such lien unless a claim therefor in writing shall be made," etc. In the above case it is said: "The lien is *created* by the filing of the petition." It was not necessary to the case to have said this. The claimant had died, and an administrator had filed the lien within the year. The time had not expired for filing the claim or petition. Then why did not such filing create the lien? It is answered by the real decision: "No action lies to enforce a lien in behalf of a mechanic or material-man unless the petition for the lien is filed *during the life-time* of the intestate or testator." That case, therefore, is not authority for holding that the mechanic in any case, or the laborer in this, has no lien until he files his claim. It is authority only that the lien does not survive the death of the mechanic or material-man unless fixed and determined by the filing of the claim or petition for it in his life-time. It is a personal privilege which he has the option to insist upon or waive.

The language of the above case was disapproved by this court as being "very strong,— stronger than the exigencies of the case seemed to require,"— in *Hall v. Hinckley*, 32 Wis. 362. But in that case the court gave to the filing of the claim sufficient virtue and effect to give it preference over a prior lien, the claim for which had not been filed. There is in the opinion in that case the following not overcautious language: "A careful examination has satisfied us of the correctness of the view thus early taken [in *Dobbs v. Green*, 2 Wis. 228, and *Dobbs v. Eneavl, supra*] of the

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statute, and that it should be sustained." The principle recognized in that case, that as to different mechanics' liens on buildings the lien first fixed by the filing of the claim and obtaining judgment thereon should be preferred to prior liens the claims for which had not been filed, or that the filing of the claim *creates* the lien, was evidently intended to be restricted to such a case, and not to be extended to mortgage claims, judgments, or even the claims of purchasers which originated subsequent to the commencement of the building, although the distinction is not very clear.

In *Rees v. Ludington*, 13 Wis. 276, it is incidentally said, although not necessary to the decision of the case, that "the design was to give the mechanic a lien from the commencement of the building, equal in power and effect with the lien of another creditor who had obtained and docketed a judgment."

In *Chapman v. Wadleigh*, 33 Wis. 267, prior effect of the mechanic's lien is given over mortgages originating subsequent to the commencement of the building; and to the same effect is *Lampson v. Bowen*, 41 Wis. 484. In *Hewett v. Currier*, 63 Wis. 386, the mechanic's lien is given preference over a purchaser subsequent to the commencement of the building. This principle may be considered the settled law of this state under the present mechanic's lien statute. The statute itself is clear and explicit as to the priority of the lien, and the date is fixed as "the commencement of the building." There can be no injustice to one whose claim originates after this open and notorious event occurs. "The commencement of the building" is as ample notice of the lien and claim of the mechanic to a subsequent purchaser or mortgagee as open, visible, and notorious possession could be of the title under it.

In *Paine v. Woodworth*, 15 Wis. 298, the lien of a person performing labor upon timber or lumber, given in sec. 12,

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ch. 153, R. S. 1858, was enforced as against a person holding a contract for the delivery of the logs to him as security for money advanced prior to the performance of the work and labor on them, on the principle that the labor was done for his benefit as much as for the benefit of the owner, and "for the benefit of everybody who had any interest in the property;" and such a case was likened to a sailor's lien for wages. "It follows the ship and its proceeds into whose hands soever they may come *by title* or *purchase from the owner*." That may be true of a sailor's lien for wages, but that remark was not applicable to the case. There was no title or purchase from the owner *subsequent* to the laborer's lien on the logs in the case. The claim was in the nature of the prior ownership of the logs. The case under consideration and the case of a seaman's lien upon the ship were the same in principle, however, in one most important respect. The person holding such a prior interest in the property has notice of the subsequent labor upon it to enhance its value, and the labor is for his benefit, and he is privy to the contract, express or implied. As to the seaman's lien for wages on the ship and proceeds, everybody has ample notice. The seamen are with and on the ship. They are inseparable until the seamen are paid and discharged. The seamen of previous voyages retain no lien after they have abandoned or left the service of that particular ship. A purchaser of the ship can readily inquire whether the seamen have been paid. He purchases with notice.

It is evident that the question in this case has been presented to this court for the first time, and it is not without difficulty. The language of sec. 3329, R. S., in respect to such a lien, is, "which shall take precedence of all other claims or liens thereon." The natural interpretation of this language would seem to be, "all other *existing* claims or liens thereon." *Jessup v. Stone*, 13 Wis. 467. But, however that may be, it is certainly not broad or specific enough

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to embrace the claim of a subsequent *bona fide* purchaser for value, in the usual course of trade, without notice. The language would have to be forced beyond its natural meaning to embrace such a case; and we do not think that the legislature intended such a meaning, for it has omitted to use the language to express it as against the well-known policy of the law governing the transfer of personal property, for the protection of *bona fide* purchasers in an open market for value without notice of prior claims thereon. This cardinal principle is as well expressed by Mr. Justice LYON, in *Andrews v. Jenkins*, 39 Wis. 476, as anywhere else: "It is too well settled to admit of argument or doubt that if the general owner of personal property, having possession thereof, sell and deliver to a person who has no notice, actual or constructive, that the property is incumbered, but who purchases it in good faith for value, such purchaser will hold the property discharged of any prior incumbrance. The defendants purchased the logs in controversy in the market, and paid for them the market price, without notice, either actual or constructive, that Andrews had or claimed any lien upon or interest in them."

The paramount importance and incalculable value of personal property in these modern times makes its ready and easy transfer from hand to hand, and the protection of *bona fide* purchasers thereof, absolutely essential to our modern systems of trade and commerce. Secret trusts, liens, and incumbrances, and unknown and concealed claims and interests, in and upon personal property, and especially that kind of personal property that enters so largely into the general commerce of a country, would, if enforced by law, work the greatest injustice and be utterly destructive of the greatest financial interest that any country can have. As said in *Webb v. Sharp*, 13 Wall. 14, in respect to the claim of a subsequent purchaser without notice of the landlord's lien: "Goods sold in the ordinary course of trade undoubt-

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edly become discharged from the lien. Otherwise *business could not be safely carried on.*" The same ruling in *Fowler v. Rapley*, 15 Wall. 328, and *Beall v. White*, 94 U. S. 386. Logs, timber, lumber, including boards, shingle, and lath, constitute most valuable and important articles of our trade and commerce, and are readily and necessarily and almost constantly being transferred and sold in wholesale and retail in open market, and carried and scattered over vast distances by land and water. This interest and trade are too vast and important to be clogged, impeded, and incumbered by secret liens, following them into all the distant markets of the land, to be enforced in violation of such a cardinal principal to facilitate and protect the sale of personal property.

In view of these considerations and authorities, what is the true interpretation of our statutes giving to laborers thereon a lien upon logs, timber; and lumber? What is the object or purpose of filing a claim for such lien in the office of the clerk of the circuit court of the county unless it be for *notice* to somebody? In sec. 3341, R. S., it is called "the *notice* of such lien." This constructive notice would in most cases be the only notice a subsequent purchaser would be likely to have. If he has actual notice, or knowledge of such facts and circumstances as to imply it or to put him on inquiry of such liens, then he is not an innocent or *bona fide* purchaser as against them, and should not be protected, and will not be by a reasonable construction of the statute. The laborer, while he is working upon the logs, timber, or lumber, is protected by the notice inherent in this very act in connection with the article itself, equivalent to possession of it, as in common-law liens. After he has completed his labor upon it, he can at once file his claim and his protection will continue. It is not necessary that he should delay his remedy until the article has been removed and gone into the markets of the country and into the hands of many

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subsequent purchasers for value and in good faith without any notice whatever of his claim. The proper meaning of the statute would seem to be that the laborer has a statutory lien for the value of his labor upon the logs or lumber from the time of its commencement. But it is a lien that he must claim in the way provided for, or he will be held to have waived it. He has a lien, no doubt, against all the world having actual or constructive notice of it. This would be consistent with the language: "No debt or demand for such labor or services *shall remain such lien* unless a claim therefor in writing shall be made," etc. This language is the only argument that the lien so attaches from the time of the labor or service as against subsequent purchasers without notice. In all other cases where the statute does not thus recognize the lien before filing the claim, the decisions are uniform, and it is admitted that such lien does not exist until the filing of the claim or petition. *Kruse v. Thompson*, 26 Minn. 424; *Payne v. Wilson*, 74 N. Y. 348. If this peculiar language of our statute can have force without violating the great principle and clear public policy of the law that protects *bona fide* purchasers in the usual course of trade for value without notice of the lien, then such should be its construction. If one purchase, before the filing of the claim, with notice that a certain person has worked upon the article to produce it and the time has not expired for the filing of his claim, it would seem proper that he should take notice of such a laborer's lien upon it. Or if he had been informed that a lien existed, or had such knowledge as to put him on inquiry of it and be bound to so inquire, he could scarcely be called a *bona fide* purchaser without notice. In this way the laborer can have ample protection of his lien without any infraction of, or violent exception to, the general law which protects subsequent *bona fide* purchasers without notice. Until the legislature has seen fit to declare in explicit language that the

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laborer in such cases shall have a lien paramount to the claim of such purchasers, upon a full consideration of the gravity of such an innovation upon the general law of the land made to facilitate and protect *bona fide* sales of personal property in the open market for value and without notice of such a secret lien upon it, we think this should be the interpretation of the statute.

The supreme court of Michigan, under precisely the same statute as ours in this respect, held in *AuSable River Boom Co. v. Sanborn*, 36 Mich. 358, and subsequently in *Haifley v. Haynes*, 37 Mich. 538, that such a lien, until the claim therefor had been filed, did not exist as against a subsequent purchaser of the logs in good faith and without notice. I should have done better to have quoted the reasons given in these cases for so holding than to have attempted originality, and may be permitted to quote briefly therefrom in addition to what has already been quite tediously expressed. That court said: "It is plain that justice and policy, as well as precedent, require a rigid construction of this statute, to hinder its operation, so far as may be, against valuable rights, and especially where a contrary view would imperil the rights and interests of innocent third parties."

It may be proper to say that since these decisions the legislature of that state has amended the statute by an express proviso that any sale or transfer of the logs, timber, etc., during the time limited for the filing of such statement of lien, and previous to the filing thereof, shall in no way affect such lien. Whether this is a safe and judicious precedent to be followed in this state is with our own legislature. The laborer's lien should, of course, be protected as far as possible without inflicting too much loss and damage upon interests paramount by reason of their magnitude and their general bearing upon the trade and commerce of the country. It is to be presumed that he does not seek protection which would result in wrong and injustice to other

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equally innocent parties. But we do not presume to express an opinion as to what the legislature ought to do, for it is not our province to do so. We can only construe the statute as it exists, and we think the above interpretation preserves the true meaning of the language as it expresses the intention of the legislature, and that such an interpretation will work no injustice to the laborer or the purchaser.

This being our view, it follows that, under the stipulation of the parties and the finding of the court, judgment should have been rendered in favor of the appellant, the *Shell Lake Lumber Company.*

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with direction to render judgment in favor of the *Shell Lake Lumber Company.*

TAYLOR, J. The respondent brought his action against his debtor, Eugene Smith, under the provisions of R. S. sec. 3329 *et seq.*, as amended by ch. 319, Laws of 1882, claiming a lien for his labor in the manufacture of certain designated shingles. He made the appellant, the *Shell Lake Lumber Company*, a codefendant, on the ground that said company claimed some right to or claim upon said shingles.

There is no dispute, upon this appeal, as to the amount due from Eugene Smith to the plaintiff and respondent; nor that such sum was due for work and labor performed by the respondent in the manufacture of the shingles described in the complaint; nor is there any claim that the plaintiff has not in all things complied with the law to entitle him to a judgment for a lien upon said shingles if, upon the facts proven and admitted on the trial, the statute gives him such lien as against the claim of the appellant. On the trial it was admitted by the appellant that the plaintiff had, between the 21st day of May, 1883, and the 23d day of March, 1884, performed work and labor for the defendant Eugene Smith in helping to manufacture the shin-

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gles in question and other shingles; that on the 23d day of March, 1884, when the plaintiff quit work on such shingles, there was due from Eugene Smith to him for such work and labor the sum of $609.45; and that a settlement was had with Eugene Smith on the 2d of April, 1884, by which it was found that there was still due and unpaid to the plaintiff, for his said labor and service, the said sum of $609.45, upon which sum said Eugene Smith agreed to pay interest from that date at the rate of eight per cent. per annum. It was also admitted that the plaintiff duly filed his claim for a lien on said shingles, in the proper county, on the 5th day of April, 1884, and the complaint in this action was verified on the 9th day of April, 1884, and the summons was served on the 11th day of April, 1884.

The only defense to the action set up in the answer of the appellant, and relied upon in this court, is that the appellant was a *bona fide* purchaser of the shingles without notice of the plaintiff's claim to have a lien thereon.

Upon this subject the learned circuit court found as a fact as follows: "(7) That all the shingles mentioned in the complaint were sold in the usual course of trade by the defendant Eugene Smith to David Joyce and the *Shell Lake Lumber Company*, part being sold to one and part to the other, and that the same were so sold to the said Joyce and the said defendant the *Shell Lake Lumber Company*, and were by them purchased in the due course of trade, before the filing of the plaintiff's claim for a lien, and without any knowledge of the plaintiff's claim, and that all the payments were made to the said Eugene Smith, or on his order, to or for the purposes hereinbefore set forth, and before the said purchasers had any notice or knowledge whatever of the plaintiff's claim or of the defendant Smith's indebtedness to the plaintiff; and that all said shingles were delivered on the premises of the *Shell Lake Lumber Company* before the defendant the *Shell Lake Lumber Company* or

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David Joyce knew of the existence of defendant Smith's debt to plaintiff." It will be seen by this finding that the precise time when the shingles were purchased is not stated, nor is it stated in the admissions and stipulations of the parties or in the previous findings of the court; but the sixth finding of fact clearly indicates that the sale must have been perfected as early as the 18th of March, 1884.

The sixth finding shows that, while Eugene Smith was engaged in manufacturing the shingles in question, the appellant furnished Smith a large amount of supplies, which were used by him in the manufacture of said shingles, consisting of groceries, provisions, and other necessaries, and in boarding and paying the men engaged in the manufacture of said shingles. The amount or value of such supplies is not stated or found by the court. This finding does, however, state that on the 18th of March, 1884, the appellant advanced and paid to the order of Smith $1,961.43; that this sum was paid and advanced to Smith on his orders in favor of the men who composed the night crew, who had been engaged in manufacturing said shingles; that these advances and payments were all made before the filing of the plaintiff's lien in this case, viz., April 5, 1884. This finding further states that all the men engaged in manufacturing said shingles were not paid by said "*Shell Lake Lumber Company* or by the said Smith, and that the plaintiff was one of the men who was not so paid." The answer of the appellant does not show the exact date of its alleged purchase, except that it was made before the 5th of April, 1884, the day plaintiff filed his claim.

From these findings, the admissions of the parties, and the answer of the appellant, it is quite apparent the purchase made by the appellant must have been completed by the payment on the 18th of March, 1884, as it does not appear that any payments were made after that date. The purchase was consequently made while the plaintiff was

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still engaged in the manufacture of shingles for the said Eugene Smith. We think it must be inferred, from the facts found and the answer of appellant, that the sale must have been completed on the day the last payment was made by the appellant, viz., the 18th of March, 1884.

The act in force when the work in this case was performed, is ch. 319, Laws of 1882. Sec. 1 of this act amends sec. 3329, R. S. 1878, so as to read as follows, viz.: "Any person who shall do or perform any labor or services in cutting, felling, hauling, measuring, driving, rafting, booming, cribbing, towing, *sawing*, or *manufacturing into lumber* any logs or timber, in any of the counties in this state, shall have a lien upon such logs, timber, or lumber for the amount due or to become due for such labor or services, *which shall take precedence of all other claims or liens thereon*," etc. Sec. 2 amends sec. 3331, R. S. 1878, so as to read as follows: "No debt or demand for such labor or service *shall remain such lien*, unless a claim therefor in writing shall be made and signed by the claimant or his attorney, and verified by the claimant or some one in his behalf, in the same manner that pleadings in civil actions may be verified, setting forth the nature of the debt or demand for which the lien is claimed, the amount claimed to be due, and a description of the logs, timber, lumber, cord-wood, etc., against which the lien is claimed, and that the claimant claims a lien thereon pursuant to this chapter and the chapter to which this is amendatory." The remainder of the section prescribes where the claim for lien shall be filed, and the time within which it must be filed. The time for filing the lien when the work is done between November 1st and the 1st of May following is on or before the 1st of June, and in other cases within thirty days after the work and labor are completed. Sec. 3332 of the Revised Statutes of 1878, which was not amended by said ch. 319, Laws of 1882, provides that "such lien claim shall cease to be a lien on the prop-

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erty named in such petition or statement unless action be commenced within four months after filing such petition or statement."

It is claimed by the learned counsel for the appellant that the lien of the laborer is subject to the claim of a *bona fide* purchaser of the logs, timber, lumber, etc., from the person owning such logs, etc., and who employs the laborers to get out such logs and timber, or to manufacture such logs and timber into lumber. To my mind this claim is in direct conflict with what was intended by the legislation creating the lien in favor of the laborer, as well as inconsistent with the very nature of a lien. There can be no doubt as to the object of the legislature in regard to laborers' liens. It was clearly to give the laborer a certain fixed claim upon the personal property produced or enhanced in value by his labor, and to secure to him a prompt and easy method of compelling payment for such labor. The nature of a lien at common law necessarily excluded all claims of those claiming under the owner after the lien attached. The common law gave the lien to the mechanic, artisan, or others, for the value of work done and materials furnished in the repair or construction of some article belonging to another, and could only be enforced in favor of one having the actual possession of such article. It would be a superfluous work to cite authorities to show that the person having a lien upon personal property at common law could not be divested of such lien by the owner by any act of his, so long as the claimant retained the possession of the article upon which the lien existed. When the statute gives a lien for labor done upon an article, of which he has not, and in the nature of his employment cannot have, the possession required at common law, the clear inference, without express words, is that the lien shall have the same force without possession as it had at common law with possession, and consequently no act of the owner subsequent to the

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date at which the lien attaches can divest such lien. If the laborer has an acknowledged claim or lien upon the property, no act of the owner can divest it. If the lien can be divested without the consent of the claimant by the single will of the owner, then there is wanting the very essence of a lien. That a statutory lien is to be construed as of the same nature and efficacy without actual possession as the common-law lien with possession, seems to be well settled by all the authorities.

In *Beall v. White*, 94 U. S. 386, the court say: "Statutory liens have, without possession, the same operation and efficacy that existed in common-law liens where the possession was delivered."

"The office of a lien is not to create an estate, nor in the slightest degree to affect or interfere with prior incumbrances, but to prevent subsequent alienations or incumbrances to defeat a just demand." Houck, Liens, secs. 141, 142. What is said in this extract about a lien affecting prior incumbrances is probably not applicable to the claimant for a lien upon personal property.

In the case of *Grant v. Whitwell*, 9 Iowa, 156, 157, after speaking of the nature of a lien by judgment upon real estate, and showing that no alienation by the owner after the lien of the judgment attached could defeat such lien, the court say: "The same idea holds good of a mechanic's lien. He has it from the time of furnishing the work or materials, or putting them in the building. It rests upon the house and holds it so that it cannot be divested; but to enforce it and have the subject of it applied to his payment he brings his action. His lien is not then created, but it is judicially ascertained and declared, or, as it is termed, established. It existed before and rested upon the premises subject to his claim, and by the judgment is applied to his benefit. This is the notion of a lien, and it is only through such idea of it that it can hold property against other

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claims accruing subsequently. . . . The same virtue exists in these statutory liens in which possession does not pass, that existed in those at common law when they were accompanied by possession."

In *Taggard v. Buckmore*, 42 Me. 81, it is said the lien referred to in the statute cannot be a general lien; the language forbids such construction; but in its character it is the same as a particular lien at common law. "The principle embraced in the statute is founded in natural justice, that the party who has enhanced the value of the property by incorporating therein his labor or materials shall have security on the same, though changed in form, and inseparable from the property." This was said of a lien for labor or materials furnished in the construction of a vessel.

The foregoing is sufficient to show the nature of a lien, and that the idea of lien excludes the idea that it can be divested, so long as it exists according to law, by any act of the general owner not assented to by the lien claimant.

As to the extent of the lien given by the statute above quoted to the laborer, there seems to me no room for doubt. The statute giving the lien declares that "it shall take precedence of all other claims or liens thereon." It seems to me that no more general words could have been used to exclude the idea that such lien should be subject to the claim of any subsequent purchaser who became such at any time before the claimant's right to enforce his lien had expired under the subsequent provisions of the act.

That the lien must date from the time of the commencement of the work, and not from the date of its completion, or from the date of the filing of the claim for a lien, is also very clear. The second section of ch. 319, Laws of 1882, says that no debt or demand for such labor shall *remain such lien*, unless a claim therefor be filed within the time prescribed in said section. The lien referred to in this section is the one mentioned in the first section of said chap-

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ter, which it is declared shall take precedence of all other claims and liens. The regulation in this second section for giving the notice, when the labor is performed between the 1st of November and the 1st of May following, clearly indicates that the claim, when filed as prescribed, shall make all the labor between those dates a lien if it has not been paid for. The lien must date from the time of the commencement of the labor performed, and covers all the work done between the stated periods, or at the time the work is completed, or when the claim is filed. It is clear from the language of the statute that the filing of the claim is not the date of the lien, as such construction is in conflict with the language used; and if it only attaches when the work is ended the statute would furnish no security at all for the labor performed, and might better be repealed. In the case of a mechanic's lien this court has repeatedly held that the lien of the workman or material-man dates from the commencement of the building, or of the repairs when the lien is for repairs, and takes precedence of all subsequent liens. *Redmon v. Phœnix F. Ins. Co.* 51 Wis. 302; *Lampson v. Bowen*, 41 Wis. 484; *Hewett v. Currier*, 63 Wis. 386; *Hall v. Hinckley*, 32 Wis. 365; *Bryant v. Small*, 35 Wis. 208, 209; *McCoy v. Quick*, 30 Wis. 521; *Willer v. Bergenthal*, 50 Wis. 474. And it seems to me that a like rule should be applied to the lien of the laborer on logs or lumber, and that his lien attaches at the time he commences work.

This court has always construed these statutes giving liens to laborers liberally, to effectuate the clear purpose of the legislation, viz., to secure the laborer pay for his wages out of the property which his labor has created or enhanced in value, which purpose the supreme court of Maine says is in accordance with natural justice. This court may not, perhaps, have expressly passed upon the question of the relative rights of the lien claimant and purchasers of the property upon which his work has been performed subse-

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quent to the performance of such work, but it has passed upon the question as to his right as against a person claiming by a prior title or lien, and has held in favor of the laborer's lien as against such claimants by prior title or lien.

In *Paine v. Gill*, 13 Wis. 561, this court said: "We have no doubt that it was the intention of the legislature to make this lien prior and superior to existing liens upon this kind of property. It is analogous in principle and reason to the case of repairs and improvements on personal property, when the law gives a lien upon the thing itself in favor of the mechanic or person who has laid out his labor or money in such improvements."

In *Paine v. Woodworth*, 15 Wis. 303, 304, it was again said: "The whole merits of the controversy depend upon the question whether, when a party has contracted with another party for the delivery of a lot of logs at a particular place, and for a prior lien on those logs as a security for a debt, such lien so contracted for cuts off the lien which the law gives the workman who performed the very work on the logs necessary to a fulfilment of the first contract. As we said before, we think it does not; but that it was the intention of the statute to give such workmen an absolute lien, when they were employed to do the work by any one having competent authority, as against everybody, upon the principle that the labor enhanced the value for the benefit of everybody who had any interest in the property."

In both the cases above cited the person for whom the claimant did the work in running the logs had sold the logs and received his pay therefor in full before the work was done, but before the logs were delivered under the contract, and under an agreement that the person to whom the logs were sold should have a lien on the logs for all moneys advanced on them before delivery. This case, it seems to me, presents full as great equities on the part of the prior purchaser as there can be in favor of a subsequent one. In

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these cases the claim was not filed, nor the action to enforce the lien commenced, until after the logs had been paid for by and delivered to the purchaser. The circumstances of the purchasing claimant were similar to those in the case at bar. He furnished the supplies and money to get out and deliver the logs as a part of the purchase money, the same as the appellant did in the case at bar. The law under which these cases were decided was sec. 12, ch. 153, R. S. 1858, which only gives the lien in the following general terms: "Any person or persons performing manual labor upon any land, timber, or lumber, for or on account of the owner, agent, or assignee thereof, may avail themselves of the foregoing provisions of this chapter, and upon complying with the requirements thereof shall have a like lien for the amount of work and labor performed, and the said lien may be carried into force and effect pursuant to the foregoing provisions of this chapter." The chapter relates to the mechanic's lien for the construction of houses, etc.

It seems to me very clear that the lien given by the said section cannot be said to be more absolute or far reaching than the lien given by ch. 319, Laws of 1882. A like decision was made by the supreme court of Maine in *Spofford v. True*, 33 Me. 284. In this case it was held that the laborer's lien upon logs took preference of the lien of the former owner of the lands from which the timber was cut, and who had conveyed it to the person employing the laborer, without receiving his pay therefor, and with a reservation of a lien of five dollars per M. feet on all timber cut therefrom by his grantee, he being authorized to cut and remove the timber subject to such lien. In deciding this case the court say: "This laborer's lien takes away none of the rights of the owner, nor the one interested therein, by lien or otherwise, any further than is necessary for the security of those who are presumed to have added something to its value, equal to the expense, at least, incurred."

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The statute of Maine gives the lien in general terms, without expressly declaring that such lien shall take precedence of any other claims or liens.

On the question whether, when a statutory lien has attached and the lien claimant has pursued the course pointed out by the statute to enforce such lien within the time prescribed by law, his lien can be destroyed by any subsequent act of the person owning or having the lawful possession of the property upon which the lien attaches, by a sale or incumbrance thereof, it seems to me must be answered in the negative upon all considerations. *First*, the act itself, as I understand it, expressly negatives the power of the owner or possessor to defeat the laborer's lien after it attached, without his consent, in any and all cases; *second*, if the object of the act is considered, that negatives such power. If the power be granted, then the main object of the legislature is destroyed, and it is especially likely to defeat the object of the statute in all cases where the laborer most needs its protection, viz., in those cases where his employer is impecunious, dishonest, or neglectful of his business. Such employers are the ones most likely to make sales of the materials produced by the labor of their employees, without regard to the question of whether their wages are paid or not. When the laborer has an honest or responsible employer there is generally little need of the protection of the statute.

The great preponderance of the authorities is that a lien which has attached cannot be destroyed by any subsequent act of the owner or employer not assented to by the lien claimant, and the same preponderance of the authorities hold that the lien is equally as effective against a *bona fide* purchaser or incumbrancer as against any other person. As stated above, the very idea of a lien excludes the idea that it can be divested by the owner without the assent of the lien claimant.

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In *Dunklee v. Crane*, 103 Mass. 470, the court say: "The statute contains no express provision that the lien shall attach and have a priority over mortgages and other incumbrances created after the contract, but such is the necessary implication. . . . The nature of the security intended to be created by the statute necessarily tends to this result. Any other construction would defeat the manifest purpose of the legislature to give to those who, by virtue of contracts with the owner, have by their labor and materials increased the value of his property, an interest in it until the debts due them for such labor and materials are paid."

In *Edwards v. Derrickson*, 28 N. J. Law, 39, 49, the judge delivering the opinion says: "The objection would be well taken if the builder and owner can destroy the lien contemplated by the act by selling or encumbering the property after the work is done and the materials are furnished, but before the claim is filed. Can he do this? I will not discuss this question, as it has not been raised, and to admit it is to consider the law itself to be powerless nonsense."

In *Vandyne's Ex'rs v. Vanness*, 5 N. J. Eq. 485, it was held that the lien should be preferred to a mortgagee who had taken his mortgage after all the work was done, and before the claim was filed, the mortgagee being entirely ignorant of the claim of the person having the lien.

Houck, in his work on Liens (p. 146), says: "A subsequent transfer of the property ought and does not affect the lien after work has been actually begun." The same was said by this court in *Hall v. Hinckley*, 32 Wis. 365. See cases cited above from this court. See, also, *Lampson v. Bowen*, 41 Wis. 484; *Brooks v. Railway Co.* 101 U. S. 443; *Welch v. Porter*, 63 Ala. 232.

In *Leisherness v. Berry*, 38 Me. 80, it was held that a person performing labor upon logs had precedence of a person buying the same of the owner after the laborer had commenced his work. In that case the court say: "The de-

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fendant attempted to establish title in himself from Lary through one Atkinson; and, if such attempt had been successful, it is difficult to perceive how it could have affected the rights of the plaintiff, whose interest was superior to that of Lary, and more especially if the plaintiff had no knowledge of, and gave no consent to, the transaction." The plaintiff had performed the work on the logs for Lary.

In *Sheridan v. Ireland*, 66 Me. 65, it was held that a laborer who had helped cut and haul the logs in the winter might enforce his lien against one who had purchased the logs after they had been run in the spring to a boom where they had been sold. The law in Maine simply gives a lien to the laborer to continue for sixty days after the logs or lumber arrives at the place of destination for sale or manufacture.

In *Doane v. Garretson*, 24 Iowa, 351, it was held that the landlord's lien upon a stock of goods of his tenant had preference to the right of a mortgagee of the tenant, who had taken possession under his mortgage for condition broken. See, also, *Grant v. Whitwell*, 9 Iowa, 152. In this case the landlord was allowed to enforce his lien against a creditor who had attached and sold the property of the tenant, and it was held that the lien attached as the rent accrued and not from the time of the commencement of the proceedings to enforce it.

In *Beall v. White*, 94 U. S. 382, the supreme court of the United States held that the landlord's lien, under the laws of the District of Columbia, took precedence of a trust deed given for the benefit of a creditor of the tenant.

The only qualification made by the courts of Iowa and of the United States in regard to these landlord liens, is that when the landlord leases the premises to a party to be used for trade as a merchant there is an implied agreement that he may sell goods in the usual course of his business to his customers, and that as to such goods, when removed

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from the leased premises, the lien does not attach. This is a reasonable presumption, but it has no application to the business of getting out logs or timber or manufacturing the same. It might have some application if the manufacturer was a retail dealer in the lumber manufactured, as well as a manufacturer. This fact being known to his laborers, there might arise a presumption that the lien for their wages should not attach to the articles sold at retail to ordinary customers.

The only case found which has any direct bearing in favor of the idea that the lien of the laborer for work performed in getting out timber or logs or in manufacturing the same into lumber is subordinate to the claim of a subsequent purchaser without actual notice of such lien, is the case of *Haifley v. Haynes*, 37 Mich. 535. While I have great respect for the learning and ability of that court generally, it seems to me that in this case, by their own admissions, they undertook a little judicial legislation to avoid, as they imagined, very grave evils which would arise if the statute were construed as it was clearly intended that it should be by the legislature. The legislature of Michigan did not appreciate the imaginary dangers anticipated by the learned judges, and at the very first opportunity amended the act so that thereafter the learned judges could not mistake its meaning, by adding a proviso to the third section of the act, which reads as follows: "Provided, that any sale or transfer of the logs or timber or staves upon which the lien is claimed, during the time limited for filing such statement or petition and previous to the filing thereof, shall in no way affect such lien; but such lien shall remain and be enforced against such logs, timber, and staves in whosesoever possession the same shall be found." See No. 3, Laws of Mich. 1879. This amendment still remains the law of Michigan (see sec. 8415, Gen. Stats. Mich.), and its provisions have been extended so as to include shingles,

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railroad ties, telegraph poles, cedar posts, and tan bark; and yet it has not yet become a matter of public notoriety that the business interests of the people of Michigan have suffered by legislation "so replete with danger" in the opinion of the learned judges of that state.

To me it is clear that the legislature, in their practical wisdom, have seen fit to prefer the rights of the laborer to the rights of the purchasers, *bona fide* or otherwise, of certain kinds of property, to the extent of securing such laborers payment for their labor expended upon such property; and I do not feel called upon to override that policy by any strained construction to protect such purchasers, on account of any imaginary evil which may be thought likely to result therefrom. If the evils of such a law are greater than its benefits, the legislature will be prompt to ascertain that fact, and, when necessary for the general good, correct the evil.

I think the judgment of the circuit court should be affirmed.

EARLY, Appellant, vs. THE CHIPPEWA LOGGING COMPANY, Respondent.

January 12 — February 1, 1887.

Sale of chattels: Logs and timber: Acceptance: When scaling conclusive.

1. Where a contract for the sale of logs provides that the purchaser shall pay at one rate for good, sound, merchantable logs, and at another rate for inferior logs, a mere acceptance of the logs is not an acceptance of the entire lot as being good, sound, and merchantable, even though they are so marked by a scaler who was employed solely for the purpose of ascertaining the quantity, not the quality, of the logs.
2. Where the logs sold are scaled by a person mutually agreed upon, his estimate of the quantity and of the deductions to be made for defects is binding upon the parties unless impeached for fraud, mistake, prejudice, or neglect.

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APPEAL from the Circuit Court for *Chippewa* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This action was brought to recover the contract price of a lot of logs which had been cut and put into the river by the plaintiff for the defendant. The logs were cut and delivered to the defendant by the plaintiff under a written contract, the material parts of which are as follows:

"This agreement made and entered into this 12th day of September, A. D. 1882, by and between *H. W. Early*, of Williamsport, Pa., of the first part, and the *Chippewa Logging Company*, a corporation of Eau Claire, Wis., of the second part, witnesseth, that the said first-named party, for and in consideration of the agreement hereinafter contained on the part of the second-named party, hereby agrees, during the logging season of 1882 and 1883, to cut, haul, and deliver to the second-named party, on the Elk river, in the county of Price and state of Wisconsin, about fifteen hundred thousand feet of good, sound, merchantable, white pine saw-logs, the same to be cut as directed by the second-named party, said logs to be cut as long as the timber will permit, and scale straight and sound, and none to be less than ten inches in diameter at the top end; the same to be cut from the timber now standing on the lands situate in the county of Price and state of Wisconsin, and described as follows, to wit, . . . In consideration whereof, the second party hereby agrees to pay the first-named party for said logs eight dollars per thousand feet according to the scale; the same to be paid at the time and in the manner following, to wit: One and 25-100 dollars per M. as fast as banked and scale-bills rendered; one and 25-100 dollars per M. when camp breaks; balance in four equal payments, one fourth July 1, one fourth August 1, one fourth September 1, and one fourth October 1, 1883. It is mutually agreed, by and between the parties hereto, that in case the first-

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named party shall neglect to furnish to the second-named party the statement of logs scaled and the other statements herein provided, then the second-named party may obtain such statements, or the information intended to be contained therein, at the expense of the first-named party.

"It is further mutually agreed by and between the parties hereto that the scaling of said logs shall be under the supervision of a competent person; and that all estimates of the contents of logs, for the purpose of this contract, shall be upon the basis of sixteen feet in length for each log. It is further mutually agreed that all logs banked from the said lands during the season of 1882 and 1883, which are acceptable to the second-named party, shall be marked with the second-named party's marks; and all such logs that do not come up to grade under this contract shall constitute a second class of logs, and shall be sold to the second-named party at a price per thousand feet relative to the first-class logs, considering size and quality. Said second-class logs shall be marked for a bark-mark thus, '1*1,' cut in the side of each log half way round; and for an end-mark thus, '(C. L. Co.),' stamped at least five times in each end of each log. It is further mutually agreed that the second-named party shall take all logs that shall scale one-half merchantable."

The case was referred to a referee to hear, try, and determine the same. Upon the trial it was claimed by the plaintiff that the defendant, under the contract, was bound to pay him at the rate of eight dollars per M. for all the logs put in by him, without regard to the quality of the logs. On the part of the defendant it was claimed that the logs put in and delivered to the defendant were not "good, sound merchantable logs," as required by the contract, and that the company was only bound to pay eight dollars per M. for "good, sound, merchantable logs," and that there was not as large a quantity of logs as claimed by the plaintiff. Upon both these points a large amount of testimony was taken at

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the hearing. It was also claimed by the plaintiff that if there was any defect in the quality of the logs delivered, so that they did not come up to the standard required by the contract, such defects were palpable, and that the defendant waived any objection to the quality of the logs by accepting the same.

The learned referee, after hearing all the evidence, found that the plaintiff had put in the quantity of logs claimed by the plaintiff, as scaled by Fleming, a scaler appointed by the parties to do the scaling, and that there was not sufficient evidence to impeach the correctness of the scale of said Fleming, and that the parties had never agreed upon any person to supervise the scale made by Fleming, as provided in the contract. He also found that, after having examined the logs, the defendant made no objection to said logs as not acceptable under the contract until after they were all put in, marked, and delivered under the contract. He also found that all the logs put in by the plaintiff, viz., 1,848,640 feet, were accepted by the defendant "as good, sound, merchantable, white pine saw-logs," and were to be paid for at eight dollars per M. The referee says in his second conclusion of law that he "deemed it immaterial to find whether they were such logs as the defendant was bound to accept under the contract."

The referee having made his report, on motion of the defendant the circuit court modified the findings of the referee in two very material respects: *First*, the learned circuit judge found that the scale of the logs made by Fleming had been impeached, and that the real quantity of logs put in by the plaintiff, after rejecting 98,120 feet as culls, was only 1,490,710 feet; and, *second*, he found that of this 1,490,710 feet only two thirds were good, sound, merchantable logs, as required by the contract, and the other one third was a poorer quality and worth only five dollars per M.; and, *third*, under the evidence, the receiving of the logs by the

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defendant was no waiver of his right to insist that the logs so received were not all of them "good, sound, merchantable logs" under the contract, for which he was bound to pay eight dollars per M.; and he modified the findings in these respects, and entered judgment on the report of the referee so modified. Exceptions were duly taken by the plaintiff, and from the judgment entered upon the modified report of the referee he appeals to this court.

For the appellant there was a brief by *W. F. Bailey* and *H. Richardson*, and oral argument by *Mr. Bailey*. To the point that a scale made by a scaler mutually agreed upon is conclusive unless impeached for fraud or mistake, they cited *Busch v. Kilborne*, 40 Mich. 297; *Perkins v. Hoyt*, 35 id. 506; *Ortman v. Green*, 26 id. 215; *Scott v. Whitney*, 41 Wis. 504; *Smith v. Kelly*, 43 Mich. 390; *Tetz v. Butterfield*, 54 Wis. 242.

For the respondent there was a brief by *Marshall & Jenkins*, and oral argument by *Mr. Marshall*.

TAYLOR, J. After a careful consideration of the terms of the contract and the evidence in the case we are convinced that the learned referee erred in finding that the defendant had accepted the entire lot of logs as being "good, sound, merchantable logs," within the meaning of the contract, and which by its terms were to be paid for at eight dollars per M. It is clear, by the terms of the contract, the parties contemplated that the plaintiff might and would cut and deliver logs which would not come within the class or grade of "good, sound, merchantable logs" designated therein, and it was also contemplated that the defendant should accept and pay for such poorer quality of logs at a price less than eight dollars per M. We think the last paragraph of the contract makes this very clear. The acceptance of the logs by the defendant could not, therefore, bind it as to the quality of the logs delivered or the price to be paid

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therefor, even if they had been delivered without any kind of objection on the part of the defendant. We find nothing in the evidence, even on the part of the plaintiff, which clearly shows that the plaintiff insisted, before the delivery of the logs, that if taken by the defendant they should be taken and paid for at the rate of eight dollars per M. for the entire lot.

The fact that the logs were marked by the scaler, Fleming, with the mark designated in the contract as that which should be placed on the "good, sound, merchantable logs," was not conclusive upon the defendant on the question whether all the logs were of the quality called for in the contract to entitle the plaintiff to eight dollars per M. for them. This was a matter which was not submitted by the parties to the judgment of said scaler. He was appointed solely for the purpose of ascertaining the quantity of logs put in, and not the quality of them. We think the learned circuit judge was right in modifying the report of the referee in that respect.

On the other hand, we think the learned circuit judge erred in deciding that the estimate of the quantity of the logs delivered made by the defendant's witness McKay should be accepted as the true quantity, rather than that made by the scaler, Fleming. The evidence shows that Fleming was selected by the parties, under the contract, to scale the logs in the first instance. It also shows that he was a competent person to do such work, and his scale should bind the parties unless corrected in the manner provided in the contract or by the production of evidence clearly showing mistake or fraud in his scale. The provision in the contract in relation to scaling is as follows: "And [the plaintiff] further agrees to cause all of said logs to be scaled as fast as banked by a competent scaler to be mutually agreed upon; and on the first day of each month after logging operations commence to render to the second-

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named party, at Chippewa Falls, Wisconsin, a statement in writing, certified by the scaler, which statement shall show the number of feet of logs, number of logs of each length, and average number of logs per thousand feet delivered up to the date of such statement; and further agrees to board the scaler, and pay his wages, except three cents per M., which the second party hereby agrees to pay." The only other provision in regard to the scaling of the logs bearing upon this question is found in the first clause of the last paragraph of the contract, and is as follows: "It is further mutually agreed by and between the parties hereto that the scaling of said logs shall be under the supervision of a competent person."

If this last provision has, as it is claimed by the defendant, relation to some other person than the scaler to be mutually agreed upon by the parties under the first provision above quoted, we think it clear, in order to bind the plaintiff absolutely by the estimates made by such supervising person, such person should also be mutually agreed upon. Otherwise the estimates of such supervisor would have no binding force upon the plaintiff, except as the testimony of a witness in the case tending to impeach the correctness of the sale made by the scaler provided for by the other clause of the contract. There is no evidence in the case tending to show that the plaintiff assented to the supervision of McKay. On the contrary, he expressly testifies that he objected to McKay acting as supervising scaler, on the ground that he was in the constant employ of the defendant. We do not think the plaintiff is to be bound by the estimates of McKay as to the quantity of the logs delivered, except so far as his testimony tends to show that Fleming made an unjust scale of the logs. He is not to be considered as a supervisor of the scale, mutually agreed upon by the parties, and whose judgment should bind the parties as to quantity. Taking the testimony of McKay and the

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other witness Kane, we do not think it should destroy the effect of Fleming's scale. It is admitted that Fleming was a competent scaler, and the proofs show that the monthly reports were made as required by the contract; and the proofs also show that he made no mistakes in scaling sound, straight logs. The thing complained of by McKay and Kane is that in scaling defective logs he overestimated the quantity and did not make a sufficient deduction for the defects of the logs. This is clearly a matter of judgment, as to which two men of equal competency and honesty might disagree. The witness Kane says: "The matter of deduction to be made on a scale of a defective log is purely a matter of judgment of the scaler."

The contract having provided for a scaler to whose judgment these matters were to be submitted in the first instance, and whose judgment, unless clearly impeached, should bind the parties, his judgment must bind the parties, unless it be shown by impartial tests that his judgment was warped by prejudice, or that by reason of neglect or carelessness he failed to exercise an honest judgment in the matter intrusted to him. We do not think the evidence of the defendant was sufficient to justify the court in rejecting the scale made by Fleming as to any logs which were not in fact culls.

As to the other objection made to the scale made by Fleming, that he scaled culls which should not have been scaled at all, we are not so clear that the evidence does not justify the learned circuit judge in holding that Fleming had scaled 663 logs, measuring 98,120 feet, which should not have been scaled at all under the contract, and were in fact worthless culls. The contract provided that defendant should take "all logs that scaled one-half merchantable," and by fair inference the defendant was not required to take logs not coming up to that scale. Many of the witnesses besides McKay and Kane testified that there were a considerable

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number of logs put in by the plaintiff that were entirely worthless, and which should have been rejected as culls. Upon this question we do not feel justified in reversing the finding of the circuit court. We think no injustice will be done to the plaintiff, under the evidence, in sustaining the finding of the circuit court as to the number and quantity of the logs rejected as worthless,—at all events as not coming up to the standard fixed in the contract, viz., one-half merchantable. If the plaintiff put in logs which he was not authorized to do under the contract, and mixed them with those which the defendant was bound to accept, he would have no claim on the defendant for their value, if they had any value, simply because the defendant did not separate them from those it was required to accept and pay for.

On the whole evidence, we think the learned circuit court should have found that the plaintiff put in, under the contract, the quantity found by the scaler Fleming, less the 2,000 feet mistakes in footing, and the 98,120 feet of culls, viz., 1,750,520 feet.

The only other material question is the amount which the defendant ought to pay for that quantity. A careful reading of the evidence leaves a strong impression that a considerable portion of the logs put in by the plaintiff and received by the defendant were not "good, sound, merchantable logs," within the meaning of those words in the contract, and, as a consequence, he was not entitled to receive eight dollars per M. for all of them. This question the learned referee before whom the action was tried expressly declares he does not pass upon; and in determining it, therefore, upon the evidence, we are not required to reverse any finding made by such referee.

Upon the whole evidence it is impossible to say, with any great degree of exactitude, what part should be paid for at the rate of eight dollars per M., and what part at a less

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rate. We have concluded to adopt, in part, the finding of the learned circuit judge upon this question, and allow the plaintiff at the rate of eight dollars per M. for two thirds of the amount he found the plaintiff was entitled to receive pay for, and to allow five dollars per M. for the other third of such amount, as well as for the amount disallowed by the learned circuit judge other than the culls. We are conscious that this method of adjusting the rights of the parties in this case is not based upon any very clear and certain testimony, but is the result of the impression made from the whole evidence. If this determination of the matter works any injustice to either party, it must be attributed to the inherent difficulty of ascertaining the exact rights of parties depending upon a contract very vague and indefinite in its terms and upon the conflicting testimony of the witnesses of the respective parties upon the subject of the quality and value of the logs in question. But as a court or jury must in all cases of doubtful and conflicting evidence, as well as in cases when the evidence is clear and certain, still render a certain verdict or finding, we have determined to make the finding in this case certain upon the basis above stated.

Upon the whole evidence we are well satisfied of two things: *First*, that the plaintiff was not entitled, under his contract, to demand of the defendant eight dollars per M. for all the logs put in by him and received by the defendant; and, *second*, that the quantity of the logs for which he is entitled to pay at some price is the amount fixed by the scale of Fleming, deducting 2,000 feet, mistake in footing, and 98,120 feet for logs rejected as culls. Being satisfied upon these points, we have substantially adopted the finding of the learned circuit judge as to what portion of the logs should be paid for at the rate of eight dollars per M., and what part at a less sum, viz., five dollars. Upon the basis we have adopted the plaintiff is

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entitled to recover for the logs as follows: The whole number of logs put in by the plaintiff was 1,848,640 feet. From this amount deduct 98,120 feet of culls, for which he is entitled to no pay, and it leaves 1,750,520 feet for which he is entitled to pay. From this amount we deduct fifteen per cent., which was rejected by the learned circuit judge, and, putting it in the second or proven class of logs, viz., 262,578 feet, deducting this amount from the 1,750,520, there remains 1,487,942. For two thirds of this amount the plaintiff is entitled to recover at the rate of eight dollars per M. feet, viz., 991,961 feet; and for the other one third, 495,981 feet, and for the fifteen per cent., 262.578 feet, making together 758,559 feet, he is entitled to recover at the rate of five dollars per M. feet. In addition, the plaintiff is entitled to recover three cents per M. on the whole amount for scaler's fees, under the contract, $52.57.

The amount which the plaintiff is entitled to recover of the defendant for the logs, under this adjustment of the rights of the parties, is as follows:

991,961 feet at $8 per M.	$7,935 68
758,559 feet at $5 per M.	3,792 79
For scaling	52 57
	$11,780 98
Amount paid by defendant before suit	7,375 00
	$4,405 98

The sum of $4,405.98 remains due to the plaintiff, upon one half of which he is to receive interest at seven per cent. from September 1, 1883, and upon the other half from October 1, 1883.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to render judgment in favor of the plaintiff for the sum of $4,405.98, with interest on one half thereof from September 1, 1883, and upon the other half from October 1, 1883, at the rate of seven per cent. per annum.

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LESLIE, Respondent, vs. KEEPERS and another, imp., Appellants.

January 12 — February 1, 1887.

Settlement: Fraud: Rescission: Pleading: Evidence.

In an action for a balance due upon contract for labor and materials, the defendants pleaded an adjustment and settlement in writing and full payment thereunder. *Held:*

(1) On the trial the plaintiff might avoid the alleged settlement by showing that his signature thereto was obtained by fraud.

(2) The amount paid to the plaintiff under the settlement having been conceded by the defendants to be due to him, he was not bound to return it in order to rescind the settlement.

APPEAL from the Circuit Court for *Chippewa* County.

Action to enforce a lien for labor performed and materials furnished by the plaintiff as a subcontractor in and about the erection of a bridge in Chippewa county. The case is thus stated by Mr. Justice CASSODAY:

"The complaint alleges, in effect, that July 1, 1882, the defendants *Keepers* and *Riddell* entered into a contract with the defendant county to furnish the materials, and to erect, build, and construct for the county a certain wood and iron bridge, together with the substructure therefor, over the Yellow river, in said county, all of which was performed by them according to such contract; that, shortly after the making of said contract, and on July 1, 1882, the plaintiff entered into a parol agreement with *Keepers* and *Riddell* whereby he was in effect employed as subcontractor to furnish and provide the necessary building materials for, and to erect and construct, the said substructure of said bridge, and did, between July 6, 1882, and March 8, 1883, for which he was to receive $5,200, but had received only $4,041.68; and other facts essential to recover the balance, and to make the same a lien upon the bridge. The county

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made no answer. *Keepers* and *Riddell* answered to the effect that March 29, 1883, they and the plaintiff accounted together, and fully adjusted and settled all the matters mentioned in the complaint, and that upon such settlement they were to pay the plaintiff $736.25, of which $300 was paid down, and the other $436.25 was to be paid as soon as the plaintiff should take up all outstanding liens and claims covered by his contract upon the bridge, which last-named sum had been garnished in a suit against the plaintiff. At the close of the trial, the jury returned a verdict in favor of the plaintiff, and against *Keepers* and *Riddell*, for $843.11, of which $128.20 was for interest, and the balance for what remained unpaid and not garnished. From the judgment entered upon that verdict the defendants *Keepers* and *Riddell* appeal."

For the appellants there was a brief by *Marshall & Jenkins*, and oral argument by *Mr. Jenkins*. They contended, *inter alia*, that there was an accord and satisfaction between the parties, and, this being substantially a new agreement in satisfaction of the former one, no action can be maintained on the original liability without rescission. Anson on Contracts, 307; *Suttle v. Doggett*, 87 N. C. 203; 22 Cent. L. J. 80, note 90; 2 Parsons on Contracts (5th ed.), 681; *Lockwood v. Thorne*, 62 Am. Dec. 93, note; *Davis v. Spencer*, 24 N. Y. 386; *Good v. Cheesman*, 2 Barn. & Ad. 328. The plaintiff has never rescinded, but has retained what he received under the new contract, which is incompatible with rescission. *Degraw v. Elmore*, 50 N. Y. 3; *Reid v. Hubbard*, 6 Wis. 176; *Zitske v. Goldberg*, 38 id. 223; *Cobb v. Hatfield*, 46 N. Y. 536, 537; *Bisbee v. Ham*, 47 Me. 543; *Potter v. Monmouth Ins. Co.* 63 id. 440; *Brown v. Hartford F. Ins. Co.* 117 Mass. 479; *Jewett v. Petit*, 4 Mich. 508; 49 id. 423–4; *Grant v.* Law, 29 Wis. 99; *Hart v. Gould*, 28 N. W. Rep. 831; *Stewart v. H. & T. C. R. Co.* 62 Tex. 246. When an accord and satisfaction is evidenced by a written instrument,

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and one of the parties claims that he was induced to make the substituted contract by fraud, his only remedy is in equity to obtain a judicial avoidance of the contract. *Atlantic Delaine Co. v. James*, 94 U. S. 207, 214; *Van Trott v. Weise*, 36 Wis. 439; Bigelow on Fraud, 326–328; 17 Cent. L. J. 438; *Moore v. McCullough*, 8 Mo. 402; Story's Eq. Jur. (4th ed.), 586; Bispham's Equity, 530, 531; *Kronenberger v. Binz*, 56 Mo. 122; *Chase v. Garvin*, 19 Me. 211; 6 Wait's Act. & Def. 427; *Roach v. Gilmer*, 3 Utah, 389; *Blair v. C. & A. R. Co.* 1 S. W. Rep. 350; *Fowler v. Wyatt*, 24 Beav. 232. To allow the plaintiff to introduce evidence in this case to show fraud in the settlement would be contrary to all rules of pleading and evidence. The only issue made by the pleadings was that of accord and satisfaction. That the law denied, and when it was proven it was the end of the case.

For the respondent there was a brief by *Stafford & Connor*, and oral argument by *Mr. Connor*. To the point that under the pleadings the plaintiff could show that the settlement was obtained by fraud, they cited *Hart v. Gould*, 28 N. W. Rep. 831; *Brereton v. Hull*, 1 Denio, 75; *Stafford v. Bacon*, 1 Hill, 532; *Varner v. Core*, 20 W. Va. 472; *Bankhead v. Alloway*, 6 Caldw. 56; *Wiggins v. Burkham*, 10 Wall. 129; *Perkins v. Hart*, 11 Wheat. 237; *Lockwood v. Thorne*, 18 N. Y. 292; *Ruffner v. Hewitt*, 7 W. Va. 585; *Murray v. Carlin*, 67 Ill. 286; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283; *Roth v. Palmer*, 27 Barb. 652; *Claflin v. Taussig*, 7 Hun, 223; *Wharton v. Anderson*, 28 Minn. 301; *Kayser v. Sichel*, 34 Barb. 84; *Coates v. Simmons*, 4 id. 403; *Caryl v. Russell*, 13 N. Y. 194; *Welsh v. G. A. Bank*, 73 id. 424; *Sheehan v. Hamilton*, 2 Keyes, 304; *Waddle v. Morrill*, 26 Wis. 611; *Stow v. Parks*, 2 Pin. 125; *Chambovet v. Cagney*, 35 N. Y. Super. Ct. 474; *St. L. S. B. Bottling Co. v. Col. Nat. Bank*, 5 Pac. Rep. 800; *Goodwin v. U. S. A. & L. Ins. Co.* 24 Conn. 591; *Dambman v. Schulting*, 4

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Hun, 50; *Mather v. Hutchinson*, 25 Wis. 27; *Burnham v. Mitchell*, 34 id. 118. To the point that no offer to return the amount received was necessary — that amount being indisputably due to the plaintiff on a liquidated demand — they cited *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 75; *Hollenbach v. Shoyer*, 16 Wis. 499; *Dunn v. Amos*, 14 id. 107; *Burnham v. Mitchell*, 34 id. 117; *Potter v. Taggart*, 54 id. 395; *Mullen v. O. C. R. Co.* 127 Mass. 86; *Claflin v. Taussig*, 7 Hun, 223; *Allerton v. Allerton*, 50 N. Y. 670; *O'Neill v. L. S. Iron Co.* 30 N. W. Rep. 688; *Pierce v. Wood*, 23 N. H. 519.

Cassoday, J. The alleged settlement was in writing, and purported to be for the sum of $736.25, in full settlement for material and labor furnished by the plaintiff for the substructure of the bridge — the above amount being the full contract price for said substructure, less the amount paid him and for his account on the work. The principal contention of *Keepers* and *Riddell* is that such settlement was conclusive between the parties, and that, as the complaint failed to allege any mistake or fraud in making the settlement, it was error to allow it to be impeached upon the trial. There was evidence upon the part of the plaintiff in effect tending to prove that the plaintiff went to the office of *Keepers* and *Riddell*, in Milwaukee, about the time of the alleged settlement, and requested a settlement with them; that he did not then know how much he had received from them, nor how much they had paid out on his account; that they presented to him no statement, and showed him no books or account; that they declined to show him their books or any account of the moneys they had paid him or in his behalf; that there was no dispute between them, and no item of the account as subsequently rendered was talked over between them; that *Keepers* then told him that the sum above mentioned was the amount his due; that rely-

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ing upon the truthfulness of such representations, and not knowing the contrary, he signed a written statement of the above import, upon a promise that a bill of items should be subsequently sent him by mail as soon as their books were straightened up; that such bill of items was subsequently received by him from them through the mail; that such itemized bill purported to show a balance due the plaintiff of the amount above stated, but it included several items in no way connected with the labor or material furnished by the plaintiff for such substructure or any other matter for which the plaintiff was liable or in which he was interested; that the aggregate of such foreign items so wrongfully included in said bill amounted to $714.91; that the representation of *Keepers*, to the effect that there was only $736.25 due the plaintiff at the time of such alleged settlement, was false; that there was then his due, in addition, the aggregate amount of such foreign items. Such testimony on the part of the plaintiff was controverted and denied by testimony on the part of *Keepers* and *Riddell*, who gave a very different version of the alleged settlement.

The issue thus made was fairly submitted to the jury by the learned trial judge. Under the charge of the court the jury must have found that the plaintiff's version of what was said and done at the time of the alleged settlement was substantially true and that the evidence to the contrary was false. If the matter was properly open for investigation, then the verdict is a verity and necessarily concludes the defendants. The settlement or accord and satisfaction was alleged by way of defense. Not being a counterclaim nor pleaded as a part of a counterclaim it was to be deemed controverted by the plaintiff as upon a direct denial or avoidance as the case might require. Sec. 2667, R. S. Upon the issue thus raised, it was competent for the plaintiff to prove that his signature to the writing purporting to be a

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settlement of certain matters was so procured by false representations and fraud. *Waddle v. Morrill*, 26 Wis. 611; *Butler v. Regents of University*, 32 Wis. 124; *Canfield v. Watertown Fire Ins. Co.* 55 Wis. 423, 424; *Bussian v. M., L. S. & W. R. Co.* 56 Wis. 332–337. These cases settle the practice followed by the trial court. We have no desire to renew the discussion.

It follows that the evidence upon the question indicated was properly admitted. It also follows that the alleged errors in the charge to the jury are without foundation, even had the charge been made a part of the record, which was not done.

A lengthy argument is made to the effect that the plaintiff should not be allowed to affirm the settlement in part by retaining the money paid, and rescind it as to the residue, as has frequently been held by this court. But the facts, as necessarily found by the jury, present no such question. On the contrary, it appears from the undisputed evidence that the amount *Keepers* and *Riddell* agreed to pay was conceded by them to be his due; and the jury found he was entitled to several hundred dollars more.

By the Court.— The judgment of the circuit court is affirmed.

See note to this case in 31 N. W. Rep. 486.— REP.

PHILLIPS, Respondent, vs. ROOT, Appellant.

January 12 — February 1, 1887.

EXECUTION: HOMESTEAD. *(1) Attachment: Withdrawal of traverse: Estoppel to claim exemption. (2) Sale of homestead with other tracts: Vacating sale. (3) Temporary removal.*

1. The affidavit for an attachment alleged that the defendant was about to dispose of his property with intent to defraud his creditors. The defendant traversed the affidavit, but afterwards stipulated to

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withdraw the traverse and allow the plaintiff to take judgment for a sum less than his demand. Execution issued on the judgment, and was satisfied by the sale of several parcels of land which had been seized on the attachment. *Held*, that the defendant was not estopped from claiming that one of such parcels was his homestead and exempt from sale.

2. Where under an execution a homestead is sold with other parcels of land for a gross sum, the entire sale should be set aside; but, upon application, the satisfaction of the execution will be vacated so that an *alias* execution may issue.

3. Removal from a homestead for a temporary purpose,— as to enable children to attend school,— but with the intention to reoccupy it, does not impair the exemption.

APPEAL from the Circuit Court for *Chippewa* County.

This action was commenced in March, 1881, to set aside, as a cloud upon the plaintiff's title, a sheriff's deed of certain premises described as lot 4, township 30, range 7, in Chippewa county. The deed included several parcels of land besides the premises above described, all of which had been attached in an action by the defendant against the plaintiff, November 26, 1872, and had been sold to the defendant under an execution issued upon the judgment obtained in that action, September 21, 1874. The plaintiff alleges that previous to, at the time of, and ever since, the levy of said attachment, the premises in question were his homestead and as such exempt from seizure.

Other facts are stated in the opinion. The plaintiff had judgment setting aside the sheriff's deed and certificate of sale. The defendant appealed.

Arthur Gough, for the appellant.

For the respondent there was a brief by *Stafford & Connor*, and oral argument by *Mr. Connor*.

COLE, C. J. The learned counsel for the defendant below insists that the plaintiff is estopped by the traverse of the affidavit in the attachment, or by the stipulation for judg-

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ment in that action, from now claiming that lot 4 in question was or is his homestead. It appears that the ground stated in the affidavit for the attachment was that the defendant in that suit was about to dispose of his property with intent to defraud his creditors. There was a traverse of this affidavit. While the traverse was being tried, the parties entered into a stipulation that the traverse should be withdrawn by the defendant, and that the plaintiff in that suit should take judgment for the amount claimed in his complaint,—less $50,—with taxable costs, and a judgment was entered according to the stipulation. Lot 4, with other real estate, was subsequently sold on execution issued on this judgment.

Now, we are unable to see how the proceeding on the traverse could have created an estoppel, even if it had been decided against the present plaintiff. The issue on the traverse simply was whether he had disposed, or was about to dispose, of his property with the intent to defraud his creditors. It could not possibly involve any question of homestead right in the premises which had been seized on the attachment. It is obvious that the fact whether a part of the premises attached was a homestead was one which could not be investigated on the trial of the traverse. The only matter which could be determined on that issue was the existence of the facts stated in the affidavit, nothing more. From the nature of the case, that was the sole issue to be tried. But even that issue was never tried, as the traverse was withdrawn. Neither can we see that there is anything in the stipulation which concludes the plaintiff from asserting his claim to the homestead. True, the parties stipulated to withdraw the traverse and that judgment should be entered for the amount of plaintiff's claim, less $50. It is said, because the plaintiff remitted a part of his claim, the defendant is prohibited in good faith from subsequently insisting upon the exemption. But it does not appear that

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the $50 deduction was made in consideration that the present plaintiff would waive his homestead privilege. Whether, if such a waiver was positively shown, it would preclude him from afterwards asserting his homestead right, is a question we need not consider, as no such waiver is proven. The plaintiff in that suit may have remitted a part of his claim to avoid the expense of a trial on the defendant's consenting that he should have judgment for the residue. But there is nothing in these facts which operates as an estoppel against the plaintiff claiming his homestead if it in fact was such when seized on the attachment.

Now, in respect to the question whether lot 4 was a homestead. The court below found as a fact that on and before the 26th day of November, 1872, the plaintiff did—ever since has—and now owns that lot, which does not exceed forty acres, and was used for agricultural purposes; that it has at all times been used and occupied by him and his family as and for a homestead. This being the case, the plaintiff is entitled to have the sheriff's certificate and deed, so far as that lot is concerned, canceled. It was not subject to sale on execution. Counsel claims, however, that the finding of the court on this point is contrary to the weight of evidence and all the probabilities of the case. We cannot concur in that view of the testimony. It must be admitted, we think, that there is ample testimony to sustain the finding that this lot was the homestead of the plaintiff. Indeed, it seems to us that the weight of evidence supports the conclusion that it was his homestead in 1872, when the attachment was levied. There is nothing to show any abandonment of these premises as a homestead. True, the evidence shows that his family lived some months in Chippewa Falls, and the reason for this is given. But the exemption was not impaired by this temporary removal, with the intention to reoccupy the premises as a homestead. R. S. 1878, sec. 2983. It is but a fair inference from the testi-

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mony that the removal to Chippewa Falls for some months was only for a temporary purpose, to enable the daughter to attend school at that place, without any intention of abandoning the homestead.

In this case the execution was satisfied by a sale of the homestead and three other lots. It is probable that the property was all sold together. At all events it is impossible to tell, if the lots were sold separately, what was bid for each. The court could not, therefore, grant the relief to which the plaintiff was entitled without setting aside the entire sale and canceling the certificate and sheriff's deed, as it did. The counsel for the appellant claims that it was error to set aside the entire proceedings without at least reviving the judgment or vacating the satisfaction of the execution. Of course, if the sale of the property is set aside, the satisfaction of the execution should be vacated, so that there can be an *alias* execution issued to collect the judgment. The circuit court will undoubtedly do this on application being made therefor. An execution can then be issued for the sale of any property belonging to the judgment debtor not exempt. But, as the case stood, the court was under the necessity of setting aside the entire sale. The rights of the appellant, however, can be protected by his applying to the court to have the satisfaction of the former execution vacated, and for leave to issue an *alias* execution.

We think the judgment must be affirmed.

By the Court.—Judgment affirmed.

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MORRIS, Respondent, vs. CARMICHAEL, imp., Appellant.

January 12—February 1, 1887.

Tax deed: Limitation of actions: Proof of publication of notice of sale.

1. The limitation of one year prescribed in sec. 3, ch. 309, Laws of 1880, does not cure defects in the notice of a tax sale or in the proof of publication thereof, but only defects "going to the validity of the assessment and affecting the groundwork of the tax."
2. Proof that the notice of a sale was published "*for five weeks successively*, commencing on the 9th day of April, and ending on the 7th day of May, 1879," does not show a publication "*once in each week* for four successive weeks" prior to the sale on May 13, as required by sec. 1130, R. S.

APPEAL from the Circuit Court for *Chippewa* County.

The case is stated in the opinion.

W. F. Bailey, for the appellant.

For the respondent the cause was submitted on the brief of *Hollon Richardson* and *H. H. Hayden*.

LYON, J. This action was commenced May 21, 1885, and was brought to recover the value of a quantity of pine saw-logs cut and removed by the defendant Carmichael from certain lands described in the complaint, and by him sold to the defendant The Mississippi River Logging Company, a corporation. The plaintiff recovered, and the defendant *Carmichael* (who is the real party in interest) appeals from a judgment against the defendant the logging company for the value of such logs as assessed by the jury.

The land in question was vacant and unoccupied until the defendant *Carmichael* went upon it to cut the timber. The cutting was done in the fall and winter of 1882–83. The plaintiff's claim for the timber rests for its validity entirely upon a tax deed of the land from which it was taken. The deed was executed in due form by the county of Chippewa to the plaintiff, May 17, 1882, and was properly recorded on the

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same day. This deed was issued upon the tax sale of 1879 for nonpayment of the taxes of 1878. On the trial the circuit judge held that the limitation of one year prescribed by sec. 3, ch. 309, Laws of 1880, had run in favor of the tax deed, and ruled out all testimony offered by defendants to show irregularities and omissions, not only in the assessment of the tax of 1878, but in the proceedings on the tax sale.

These rulings were erroneous. The limitation of one year prescribed in sec. 3, ch. 309, Laws of 1880, only cured defects "going to the validity of the assessment and affecting the groundwork of such tax." It was held substantially in *Urquhart v. Wescott*, 63 Wis. 135, that this statute does not cure defects in the notice of sale or proof of publication thereof, because such defects do not affect the groundwork of the tax. Hence the court should have received the evidence offered to show that no affidavit had been filed in the treasurer's office showing proper publication of the notice of sale. The affidavit offered, and the only one found in the county treasurer's office, merely stated that the notice of sale was published "for five weeks successively, commencing on the 9th day of April, and ending on the 7th day of May, 1879." It is understood that the sale was advertised to take place May 13th. The statute requires such publication to be made "*once in each week* for four successive weeks prior to said second Tuesday of May." R. S. sec. 1130. It is essential to the validity of the sale and the tax deed issued thereupon, that the proof of publication of such notice filed in the county treasurer's office should show a compliance with the statute. The proof so filed in the present case fails to meet all of these requirements. If not otherwise defective, it certainly fails to show a publication of the notice of sale "once in each week" for four successive weeks prior to the sale. See *Ramsay v. Hommel*, *ante*, p. 12.

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No statute of limitations having run in favor of the plaintiff's tax deed so far as defects in the tax sale are concerned, the court should have permitted the defendants to show the invalidity of such deed by showing fatal defects in the proceedings on the tax sale. They were not allowed to do so. This error is fatal to the judgment.

By the Court.— Judgment reversed, and cause remanded for a new trial.

THE STATE EX REL. TERRY, Respondent, vs. KEAOUGH, Town Treasurer, etc., Appellant.

January 12 — February 1, 1887.

Excise laws: Licenses to sell intoxicating liquors: Towns and villages: Census.

1. For the purpose of ascertaining the amount to be paid for licenses to sell intoxicating liquors in towns, under sec. 1, ch. 296, Laws of 1885, the question whether there is a city or village containing more than 500 inhabitants within the boundaries of any town can be determined only in the way prescribed by that act, viz., "by the last preceding enumeration by the state or general government."
2. Ch. 58, Laws of 1885, was repealed by ch. 161, Laws of 1885. As the latter act does not provide for an enumeration of the inhabitants of an unincorporated village separate from the town in which it is situated, an omission to make such separate enumeration does not render the taking of the census improper or insufficient within the meaning of sec. 11 of the act, and such omission cannot be supplied under that section.

APPEAL from the Circuit Court for *Douglas* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

Upon the affidavit of the relator, *Joseph Terry*, the circuit court of Douglas county issued an alternative writ of *mandamus* directed to the appellant, treasurer of said town

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of Superior, of which the following is a copy, omitting the title of the action:

"On reading and filing the affidavit of *Joseph Terry*, the relator above named, dated the 11th day of June, 1886, and on motion of Stephen Bacon, of counsel for the relator, it is ordered that an alternative writ of *mandamus* issue out of and under the seal of this court, directed to the said *John Keaough*, commanding him forthwith to take one hundred dollars as the fee or sum to be paid for the keeping of a saloon at 251 West Second street, Superior, in the town of Superior, in said county, for the sale, in quantities less than one gallon, of strong, spirituous, malt, ardent, or intoxicating liquors, to be drank on the premises, for the license year ending the first Tuesday in May, 1887, and to make, execute, and deliver to *Joseph Terry* the requisite receipt therefor, to exhibit to the town clerk of the town of Superior, said county, as one of the conditions precedent to procuring the issuance of his license by said clerk for such sale, pursuant to the order heretofore made by the town board of said town granting him such license, or that the said *John Keaough* show cause to the contrary before the court on the 6th day of July, 1886, at 10 o'clock A. M., at the term of said court to be held at the court house in Superior, in said town, on the 6th day of July, 1886.

"Dated the 28th day of June, 1886.

"S. H. CLOUGH, Circuit Judge."

The affidavit upon which the writ was issued, showed that the relator had made application in due form to the board of supervisors of the town of Superior for a license to keep a saloon and sell strong and other liquors in quantities less than one gallon, to be drank on the premises; that the board granted his application; that he filed the bond required by sec. 1549, R. S. 1878, which was duly approved by said board as required by law. The form of the application and of the bond, and the approval thereof by the town board,

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are all set out in the affidavit, as well as the order of said board granting his application for a license. The following is a copy of the order of the town board granting the license:

"*County of Douglas, Town of Superior — ss.:* Whereas, *Joseph Terry*, of said town, has applied to the undersigned, town board of the town of Superior, for a license to keep a saloon on the following described premises within said town, viz., 251 West 2d street, Superior, for the sale, in quantities less than one gallon, of strong, spirituous, malt, ardent, or intoxicating liquors to be drank on the premises, it is therefore ordered that to said applicant the license applied for by him be granted, upon his duly executing and filing the bond required by law, and by paying such license fee as is required by law therefor for such sale in said town; and that the town clerk attest and deliver such license to said applicant therefor, upon his producing to said clerk a receipt showing the payment to the town treasurer the sum hereby required of him, and upon his filing with said clerk the bond aforesaid.

"Given under our hands this 10th day of June, A. D. 1886.

"R. B. McLean, Chr.,
"Geo. Larson,
"Geo. Anderson,
"Town Board."

The affidavit of the relator further alleges that the said town of Superior has no village, incorporated or unincorporated, or city, with 500 inhabitants or more within its boundaries, as ascertained by the last preceding census, state or national, and that no special election had been held by the electors thereof for the purpose of determining the amount to be paid for license to sell intoxicating liquors in quantities less than one gallon, to be drank on the premises, as provided by sec. 3, ch. 296, Laws of 1885; that on

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the 10th day of June, 1886, he exhibited a certified copy of said order of the board of supervisors to the town treasurer of said town, tendered to the said treasurer $100,—that sum being the amount required by law to be paid for such license in said town,—for the purpose of getting the treasurer's receipt to exhibit to the town clerk of said town showing that he had paid the amount required by law for a license to sell such liquors in said town; that said treasurer refused to take said $100, and refused to make and deliver to the relator a receipt therefor, at the same time asserting that the sum to be paid for such license was $200.

On the return of the alternative writ the town treasurer appeared, and made answer to the writ admitting all the material facts set out in the affidavit of the relator, and that the relator had in all things taken the necessary and lawful steps to obtain such license to sell liquors in said town, except that he had not tendered a sufficient sum of money to entitle him to the same. The defendant admitted that he had refused to receive or accept the $100 tendered, and that he refused to give him a receipt therefor. The answer then alleged that there is an unincorporated village of over 500 inhabitants within the boundaries of said town, viz., West Superior, Connors Point, Superior City, and Middletown, so called, altogether an unincorporated city or village of over 1,500 inhabitants, and that by reason thereof the license fee is, by ch. 296, Laws of 1885, fixed at $200.

The answer further admitted "that the records do not show that the census of said unincorporated village, Superior, was made or taken separately from the census of said town in the year 1885, as required by ch. 58, Laws of 1885, as it was the duty of the census enumerator of said town to have done, and that no separate enumeration of the inhabitants of said unincorporated village was made in 1885 or in 1880, either in the state or national enumeration.

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The answer of the defendant further offered to show by parol evidence that said town of Superior contains within its boundaries an unincorporated village of over 500 inhabitants; or, if the court should deem parol evidence of the number of said inhabitants in said unincorporated village incompetent, then the defendant prayed that a stay of proceedings be granted in the action until an application could be made to the secretary of state for an order compelling the separate enumeration of the inhabitants of said village of Superior, and until such enumeration should be made under and by virtue of sec. 11, ch. 161, Laws of 1885.

To the answer of the defendant to the alternative writ the relator demurred on the ground that it did not state facts sufficient to constitute a defense to the writ. The circuit court sustained the demurrer, and ordered and adjudged that a peremptory writ be issued commanding the treasurer to accept the said $100 from the relator, and give him the proper receipt therefor, as prayed for by the relator. No costs were awarded to the relator by the circuit court. From this final order of the circuit court the defendant appealed to this court.

The cause was submitted for the appellant on the brief of *D. E. Roberts*, and for the respondent on that of *Stephen Bacon*.

After citing cases to show that the statute should be liberally construed, counsel for the appellant contended that although the statute fixed one method for ascertaining the number of inhabitants in a village, the town board might still resort to other means of information, and fix the amount to be paid for licenses accordingly, as it has done in this case.

TAYLOR, J. The statute provides "that the sum to be paid for such license for the sale of such liquors to be drank on the premises shall (subject to the right to increase the

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same as in this chapter provided) be, in towns having within their boundaries no city or village, incorporated or unincorporated, with a population of five hundred or more, one hundred dollars. . . . The application for any such license shall be in writing, and shall state the kind of license applied for, and a designation of the premises where such liquors shall be sold. . . . Such license shall be attested by the town, city, or village clerk, and shall not be delivered until the applicant shall produce and file with the clerk a receipt showing the payment of the sum required therefor to the proper town, village, or city treasurer, and until the filing with such clerk of the bond provided for in section 1549 of the Revised Statutes. It is hereby made the duty of all town boards, village boards, and common councils to meet and be in session on the third Tuesday in April each year, and from day to day thereafter, so long as it may be necessary for the purpose of acting upon such applications as may be presented to them conformable to the provisions of this chapter. The population of any city or village shall be ascertained by the last preceding enumeration of the state or general government." See sec. 1, ch. 296, Laws of 1885. The qualification contained in the parenthesis above has reference to the provisions of sec. 3 of the same chapter, which provides for submitting the question of the amount to be demanded for such license to a vote of the people of a town, city, or village.

The affidavit of the relator, and the return of the appellant to the alternative writ, show that the relator had made his application in writing; that he had given the bond, which had been duly approved and filed as required by law; that the town board had passed upon his application and ordered a license to issue to him "by his paying such license fee as is required by law therefor; and that the town clerk attest and deliver such license to the applicant upon his producing to said clerk a receipt showing the payment to the

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town treasurer the sum hereby required of him." It is also admitted that the relator tendered $100 to the town treasurer as the license fee required of him by law to entitle him to demand the attested license of the town clerk.

It will be seen that the board did not fix any sum to be paid by the relator in order to entitle him to the license granted, except that it should be such sum "as is required by law therefor." The statute has fixed the sum to be paid in each case, when no vote has been taken on the subject under the provisions of sec. 3 of said ch. 296, Laws of 1885. The relator claims that the sum fixed by the law in his case is $100, and no more. On the part of the appellant it is claimed that the sum fixed by the law was $200 in his case, and so the treasurer was right in his refusal to give a receipt for $100, as demanded by the relator. The whole controversy depends upon the question whether the fact that there is a city or village, incorporated or unincorporated, containing more than 500 inhabitants within the boundaries of any town, can be ascertained, for the purpose of fixing the amount of the license fee under the statute, in any other way than that prescribed in the act, viz., "by the last preceding enumeration by the state or general government." If that fact can only be ascertained in the way prescribed by the statute, then it does not appear that there is any city or village, incorporated or unincorporated, in said town of Superior, containing over 500 inhabitants, and the relator was entitled to his license on the payment of said $100, and it was the duty of the treasurer to receive the same and give him the proper receipt therefor.

If that fact can be ascertained by parol proof, for the purpose of determining the amount of the license fee, then the answer of the appellant to the writ was sufficient, and the demurrer to the same was improperly overruled, because the answer alleges that there was an unincorporated village in said town containing more than 500 inhabitants,

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and he offered to make proof of that fact by parol evidence; and, if that was deemed an improper way of ascertaining that fact, then by having an enumeration taken under the authority of the state, as prescribed by sec. 11, ch. 161, Laws of 1885.

We have no doubt that the learned circuit judge was right in holding that the fact of the existence of an unincorporated village of more than 500 inhabitants in said town could not be shown by parol evidence. It is evident that the legislature intended to fix the amount to be paid for license to sell spirituous and other liquors with certainty in all cases, and leave nothing uncertain as to that question. When, therefore, they made the amount in certain towns having cities or villages, incorporated or unincorporated, within their boundaries, containing more than 500 inhabitants, dependent upon that fact, they further provided a fixed method of ascertaining such fact, and, having fixed such method of ascertaining it, it necessarily excludes all other methods. The old legal maxim, "*expressio unius, exclusio alterius*," applies with full force in a case of this kind.

Had the last clause in said sec. 1, ch. 296, Laws of 1885, which reads, "The population of any city or village shall be ascertained by the last preceding enumeration by the state or general government," read that, for the purpose of determining the amount to be paid for a license in towns containing cities or villages, the fact whether such city or village contains more than 500 inhabitants shall be ascertained by the last preceding state or national enumeration, there could be no question that such method of ascertaining the fact would be exclusive of all other methods. We think the statute, fairly construed, means just that. It says the population *shall* be ascertained,— not *may* be ascertained. It was clearly intended to be exclusive. Suppose an enumeration of the supposed village had been taken separately in 1885 by an authorized officer under the law, and he had

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reported that the village did not contain 500 inhabitants, would it be insisted that for the purpose of increasing the license fee it might be shown that the enumerator had made a mistake? Or after the lapse of a few years, and before another enumeration was made, either by the state or national government, could it be shown, for the purpose of increasing the license fee, that the number of inhabitants had increased to over 500? We are clearly of the opinion that it could not. The certainty as to the amount as fixed by the legislature would be effectually destroyed by any such methods. To avoid all difficulty on the subject the legislature has expressly declared how the fact shall be ascertained, and it can be ascertained in no other way.

But it is further urged by the learned counsel for the appellant that a stay of proceedings should have been granted, so that an enumeration might have been taken under the provisions of sec. 11, ch. 161, Laws of 1885. Admitting that it would be competent for the secretary of state to order the enumeration of a city or village that had been omitted by the enumerating officer charged with that duty at the time of taking the census in 1885, for the purpose of determining the amount of the license fee in any particular town, and that it would be competent for the court, in a case of this kind, to stay proceedings until it could be done, still the difficulty in this case could not be obviated in that way. Ch. 161, Laws of 1885, does not provide for taking an enumeration of inhabitants in an unincorporated village separate from the inhabitants of the town in which it is situated, and such a case is not, therefore, within the provisions of sec. 11 of said chapter. It is very clear that said section only relates to cases in which a duty to make an enumeration has been omitted by the person charged with the duty; and, if there be no person charged by law with the duty of taking an enumeration of the inhabitants of an unincorporated village separately from the town, there has

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been no omission or neglect of duty, and the secretary of state has no power to order such enumeration under said sec. 11.

It is said that ch. 58 of the Laws of 1885 charges that duty upon the town clerk, and having omitted the duty, the secretary of state could now direct him to perform it under the power given him by said sec. 11, ch. 161. The trouble with this proposition is that ch. 58, Laws of 1885, is repealed by sec. 5 of said ch. 161, Laws of 1885. Ch. 58 became a law March 17, 1885, and ch. 161, April 6, 1885. At the time ch. 161 went into effect, sec. 997 of the Revised Statutes had been amended so that the proviso contained in ch. 58 was a part of it. Sec. 5 of ch. 161 amends said sec. 997, as it then was, so as to read as written in said sec. 5, ch. 161, and that section omits the proviso added to it by ch. 58; so that, according to the rule adopted by this court in the construction of statutes, the proviso is repealed. See *State v. Ingersoll*, 17 Wis. 631; *Goodno v. Oshkosh*, 31 Wis. 127; *Sydnor v. Palmer*, 32 Wis. 406. There is nothing, therefore, in ch. 161, Laws of 1885, which makes it the duty of the town clerk to make a separate enumeration of the inhabitants in an unincorporated village in such town.

The legislature in enacting at the same session several acts upon the same subject matter, without paying proper attention to the effect which one act might have on another, the result is that no provision of law is made for carrying out the license act in respect to towns having unincorporated villages within their boundaries. Had it not been for the repeal of ch. 58, Laws of 1885, the law could have been carried out according to the legislative intent. Had ch. 58, Laws of 1885, been in force, the town clerk of Superior would undoubtedly have taken an enumeration of the inhabitants in the unincorporated village of Superior, if there be such village in said town; and had he neglected to do so, on proper application the secretary of state

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would have ordered it done. If we may indulge in the belief that the legislature supposed ch. 58, Laws of 1885, was in force when ch. 296 of the same year was enacted, it greatly strengthens the construction that it was intended by the legislature that the number of inhabitants in all such unincorporated villages, as well as in incorporated cities and villages, should be ascertained only by an enumeration made by the state or general government.

By the Court.— The order and judgment of the circuit court is affirmed.

See ch. 97, Laws of 1887.— REP.

LEHMAN and another, Respondents, vs. SHERGER and husband, Appellants.

January 13 — February 1, 1887.

Evidence: Declarations: Assignment.

In a foreclosure action the plaintiffs claimed as assignees of the note and mortgage. There was no written assignment, and the mortgagee was dead. The defendants claimed that the note and mortgage had belonged to the wife of the mortgagee and had been paid to her by them. *Held:*

(1) Statements of the mortgagee, made before his death to a third person, tending to show that he had sold the note and mortgage to the plaintiff's assignor, were admissible.

(2) Evidence as to what the mortgagee said when the note and mortgage were given, offered to show that they belonged to his wife, was not admissible to defeat the plaintiff's title derived from such mortgagee.

APPEAL from the Circuit Court for *Rock* County.

The case is stated in the opinion.

For the appellants there was a brief by *Dunwiddie & Goldin*, and oral argument by *Mr. Dunwiddie*. They contended, *inter alia*, that admissions and declarations of the

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assignor are never competent evidence in favor of the assignee, and they are not made competent by being declarations against interest, offered after the assignor is dead. Abbott's Trial Evidence, 11; 3 Field's Lawyers' Br. 359; *Outram v. Morewood*, 5 Term, 123; *Brashear v. Burton*, 6 Am. Dec. 634; *Kent v. Walton*, 7 Wend. 257; *Howard v. Upton*, 9 Hun, 434; *Faulkner v. Whitaker*, 15 N. J. Law, 438; *Hill v. Myers*, 43 Pa. St. 170; *Atwell v. Miller*, 11 Md. 348; *Kilburn v. Ritchie*, 2 Cal. 145; *Worrall v. Parmalee*, 1 N. Y. 519.

For the respondents there was a brief by *Fethers, Jeffris & Smith*, and oral argument by *Mr. Fethers*. They cited, besides cases cited in the opinion: 2 Wharton on Evidence, secs. 1156–1163; *Smith v. Maine*, 25 Barb. 33.

ORTON, J. This is an action for the foreclosure of a mortgage for $400 executed November 5, 1881, by the defendants to one John Swager, and held by the plaintiffs. The answer admits the execution of the note and mortgage, but denies that the plaintiffs are the lawful owners thereof, and alleges that they have no right or title thereto, and that they belong to one Hattie Swager (who was the wife of said John), and that the defendants paid said note and mortgage to her, and the prayer is that the same be delivered up to be canceled. The evidence on the part of the defendants tended to show that John Swager left Evansville, Wisconsin, to go to Florida for the benefit of his health, on the 14th day of November, 1881, and died in Florida, January 29, 1882; that previous to his leaving the state he placed the said note and mortgage in the hands of one C. Godfrey Lehman for safe-keeping only; and that after the decease of John the defendants paid the same to Hattie Swager, his widow and heir, and that she claimed some right to the same by reason of having advanced money to purchase the lot, the sale of which to the defendants was

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the consideration of the note and mortgage. The evidence that the said John Swager had not sold the note and mortgage previous to his death consisted of statements of said C. Godfrey Lehman made to the said Hattie Swager and in presence of other persons, who testified to the same, and which were denied by the said Lehman, and perhaps of other facts and circumstances. On the part of the plaintiffs, the evidence tending to show the sale of the note and mortgage to the Evansville Furniture Company by the said John Swager, and thence to the plaintiffs, was of quite a positive character, and was corroborated by the statements of John Swager about the time of such pretended sale, and by the facts and circumstances showing that he was largely indebted to said company and said company paid him considerable money at the time.

We are asked to reverse the judgment on the ground of a clear preponderance of the evidence against the plaintiffs as to their ownership of the note and mortgage. We are unable to find such clear or any preponderance of the evidence against the plaintiffs' claim of ownership. The credibility of witnesses, and the weight to be given to their testimony, are matters which may be left with far more safety to the trial court. There are, however, some exceptions to the admission and rejection of testimony, that perhaps ought to be considered. In an equity case such exceptions are only important when the testimony outside of that in question is insufficient to support the findings.

1. The statements of John Swager, before he left for Florida, tending to show that he had parted with the note and mortgage, or sold the same to the Evansville Furniture Company, were allowed to be testified to, against the objection of the learned counsel of the appellants. This testimony was of much importance on that issue, although, perhaps, not absolutely indispensable to support the finding that the note and mortgage belonged to the plaintiffs; and

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the question is perhaps too important as a rule of evidence to be disregarded or passed in silence. There was a close privity between John Swager and his wife, Hattie. She claimed more than a wife's interest in the mortgage, and since the death of her husband she remains such claimant, and, in addition, claims as his heir. The answer presents two questions,— the first as to the plaintiff's ownership of the mortgage, and the second, by way of counterclaim, as to the ownership of it by Hattie Swager and its payment to her,— with the prayer that the note and mortgage be delivered up to be canceled. Evidence that might be proper on one of these questions might not be on the other or both. The defense of payment rests on the ownership of Hattie; and evidence that she was not the owner was pertinent and material, as it was also on the question whether the plaintiffs were the owners. No party or person through or under whom the plaintiffs derived title to the note and mortgage was a witness to testify to the communications of the deceased, John Swager, before his death, as to whether he had sold them to the said company, as we understand it, and therefore sec. 4069, R. S., was not in the way of such testimony. The question is therefore presented whether such statement of John Swager against his own interest at the time, and to prove that he had parted with the note and mortgage to the said company before his death, could be given in evidence. Why not? If John Swager were alive, his statements to the same effect would be clearly proper. This precise question seems to have been decided in *Littlefield v. Littlefield*, 51 Wis. 23. In that case the statements of both Deborah and Stephen, deceased, were allowed to be shown, to the effect that they had parted with their interest in the land to the defendant, to defeat the title of the plaintiff, as devisee of Stephen, in an action of ejectment. Such evidence seems to be sanctioned, if necessary, by other authority. 1 Greenl. Ev.

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§ 147 *et seq.; White v. Chouteau*, 10 Barb. 202; *Schenck v. Warner*, 37 Barb. 258; *Haywood v. Haywood*, 10 Allen, 105; *Fellows v. Smith*, 130 Mass. 378; *Larimore v. Wells*, 29 Ohio St. 13; and other authorities cited by the learned counsel of the respondents. The cases cited by the learned counsel of appellants do not seem to be in point against this rule, which appears to be uniform so far as I have examined the cases.

2. By some of the same authorities the declarations of the deceased would be evidence against Hattie Swager, because she was in privity with John and is in privity with his estate; and they cannot be given in her favor or in favor of the defendants. *Fellows v. Smith, supra; Littlefield v. Littlefield, supra; Schenck v. Warner, supra.* And see, also, *Hackney v. Vrooman*, 62 Barb. 650; *Holmes v. Sawtelle*, 53 Me. 179; 1 Greenl. Ev. § 189.

3. The testimony offered as to what her husband said as to Hattie's interest in the note and mortgage when they were given, in order to prove that she owned them, was clearly immaterial as well as incompetent. There was no charge of fraud or mistake in the execution of the note and mortgage to John Swager, or of anything to impeach them; and such evidence would be improper to defeat the title of the plaintiffs to them, derived from John Swager, to whom they were executed by the defendants. It is always unfortunate, in such a case, that the mortgagee, the pretended assignor, is dead, but the case must necessarily be decided on such proper testimony as the parties are able to procure. The possession of the note by the plaintiffs is *prima facie* evidence of ownership, and it does not appear that Hattie ever had possession of it.

We find no error in the record to reverse the judgment.

By the Court.—The judgment of the circuit court is affirmed.

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DIVAN, Executor, etc., Respondent, vs. LOOMIS and others, Appellants.

January 13 — February 1, 1887.

(1) Pleading: Demand and refusal. (2) Personal agreement.

1. An allegation of a refusal is equivalent to an allegation of a demand and refusal.
2. An oral agreement by the grantee of land, in consideration of the conveyance, to furnish a home to the grantor and to care for and support him during his life, is a *personal* agreement.

APPEAL from the Circuit Court for *Green* County.

The action was brought by Hiram Smith. After the defendants had appealed to this court he died and the cause was revived in the name of his executor, *Henry Divan.* The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an appeal from an order overruling a demurrer to the complaint, alleging, in effect, that May 27, 1884, Hiram Smith owned and was in the possession of the land in question, which was partly cultivated, with a dwelling-house and other buildings thereon; that said Smith was then seventy-four years of age, and in feeble health, and with very poor eye-sight, and with no family, wife, child, or domestic servant; that, in order to provide ways and means of being cared for in his old age, he proposed to the defendants *Loomis* and wife, in whom he had great confidence, to deed to *John Loomis* said land, and for them to move upon the same, and occupy it as their home, and remain upon it as such as long as said Smith should live, and he, during that time, to live in the house on the premises, and they to furnish him with a home, and take care of him, and remain on or near the premises during his life-time, and to assist him whenever called upon so to do; that *Loomis* and wife thereupon accepted said proposition,

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and he thereupon executed and delivered to *John Loomis* a warranty deed of said lands, reciting a consideration of $6,000, without anything being paid or agreed to be paid, which deed was recorded June 3, 1884; that *Loomis* and wife wholly and positively refused to perform their said agreement, or to do anything for the care, support, or maintenance of him, or furnish him any place to live, but on the contrary, July 13, 1885, sold and conveyed by deed to the defendant *Trickle* a large portion of said land, for which *Loomis* received, or was to receive, from *Trickle*, $1,800, which deed was recorded August 1, 1885; that *Trickle* took and received said deed with full knowledge of all the facts and circumstances above stated and the terms and conditions of the said agreement between Smith and *Loomis;* that *Loomis* gives out and states and is ready and about to sell and convey the remainder of said land to said *Trickle*, who states and gives out that he is about to buy the same; that said *Loomis* and wife will thereupon move to the state of Minnesota, and there remain permanently; that *Loomis* refuses absolutely to make any compensation whatever for said land. The prayer of the complaint is to the effect that each of said deeds be set aside and canceled and the land reconveyed to Smith, or that the $6,000 mentioned as the consideration in his deed to Loomis be adjudged to be the purchase price thereof, and a vendor's lien therefor be adjudged and the land sold to satisfy the payment thereof, and for a temporary injunction, and for general relief and costs.

For the appellants there was a brief by *A. S. Douglas* and *P. J. Clawson*, and oral argument by *Mr. Douglas.*

For the respondent there was a brief by *Dunwiddie & Goldin*, and oral argument by *Mr. Dunwiddie.*

Cassoday, J. It is said that the complaint is insufficient because it fails to aver any request of *Loomis* to comply

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with the terms of the alleged agreement. An allegation of refusal implies a previous demand, and is equivalent to an allegation of a demand and a refusal. *Hammond v. Mason & H. O. Co.* 92 U. S. 724; *Bogie v. Bogie*, 41 Wis. 220. This being so, the breach is sufficiently alleged. Such agreement to furnish Smith a home, and to take care of and assist him to live in a comfortable manner, was personal upon the part of *Loomis*, and could not be shifted onto *Trickle*, against the will and consent of Smith.

By the Court.— The order of the circuit court is affirmed.

KELLY, Respondent, vs. ESTATE OF STRONG, Appellant.

January 13 — February 1, 1887.

Agency: Evidence: Estates of decedents.

The deceased had received $1,500 from the plaintiff, giving her his due-bill therefor, and had afterwards repaid $300, and loaned $1,200 to a company taking its note therefor payable to the plaintiff. Upon the evidence (stated in the opinion) it is *held* that he had no authority as agent of the plaintiff to make such loan on her behalf, and that his estate was liable for the repayment of the $1,200.

APPEAL from the Circuit Court for *Rock* County.

The plaintiff, *Maria A. Kelly*, presented to the county court of Rock county, for allowance against the estate of Henry P. Strong, deceased, a claim for $1,200. She alleged that on October 30, 1882, the said Henry P. Strong had and received from her and to her use, to be repaid to her on demand, the sum of $1,500, and that he then made and delivered to her a paper writing as follows:

"Due *Mrs. Maria A. Kelly* or Mrs. M. Nellie Phillips, the sum of fifteen hundred dollars.

"*Beloit, Wis., Oct. 30, 1882.* H. P. STRONG."

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The plaintiff further alleged that on March 19, 1883, the said H. P. Strong paid to her the sum of $300 to apply on said due-bill, and indorsed the same on said due-bill; that no other payment had been made thereon; that the said M. Nellie Phillips was a daughter of the plaintiff, but had no interest in said money or said due-bill, but that her name was inserted in the due-bill so that if the plaintiff died before the money was repaid, the said Strong might pay the same to the said M. Nellie Phillips; that the said M. Nellie Phillips died before the death of said Strong, and before March 19, 1883, when the payment of $300 was made.

The claim was disallowed by the county court, and the plaintiff appealed to the circuit court. A trial in the latter court, without a jury, resulted in findings and a judgment in favor of the plaintiff. This appeal is on behalf of the estate and from such judgment.

B. M. Malone and *A. A. Jackson*, for the appellant.

For the respondent there were separate briefs by *Sale & Pierce* and *A. Taggart*, and the cause was argued orally by *Mr. Pierce.*

Cole, C. J. It was practically admitted on both sides that the instrument presented as evidence of a debt against the estate of Dr. Strong is not a promissory note, for the reason that it is made payable to one or the other of two persons, namely, the claimant or Mrs. Phillips. But the paper is certainly a written acknowledgment of indebtedness on the part of Dr. Strong. The further fact is admitted that Dr. Strong received $1,500 of the claimant; that it was her money, and that he delivered to her the writing on the day it was dated; that Mrs. Phillips, who died before the payment of the $300 indorsed on the writing, had no interest whatever in the money. These facts are conceded, or are so conclusively established by the testimony that they cannot be successfully denied. The only

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controverted matter for discussion is the question, For what purpose did Dr. Strong receive this money of the claimant? Did he borrow it of her, or did he receive it to loan for her, or was it intrusted to him for safe-keeping? Unfortunately, the testimony in the case does not furnish satisfactory answers to these questions. It is a probable, if not a necessary, inference from the facts proven, that Dr. Strong did not borrow this money for his own use. If he had done so, the writing given to show the transaction would naturally have been in a different form. Besides, it is quite clearly shown that Dr. Strong was in no need of money in October, 1882; that he had during that month, and before, and for some time after, a considerable sum standing to his credit in the bank where he kept his bank account; and that he certainly did not deposit any such sum to his own credit at or near that time. In view of these indisputable facts, we are forced to the conclusion that Dr. Strong either received the $1,500 of the claimant for safe-keeping, or some undisclosed purpose, or that it was given him to loan for the claimant when an opportunity offered. Certain it is that on the 19th of March, 1883, he paid $300 to apply on the instrument. Both the indorsement and due-bill are in his own handwriting. It further appears that on the 16th day of April, 1883, he loaned to the Rock River Paper Company $1,200, and took from the company a note therefor, payable to the order of the claimant, one day after date, with interest at eight per cent. per annum. The payment of this note was guarantied by Mr. Cobb, the treasurer of the company. He and the company were at the time in good financial standing, and were regarded as solvent and responsible. It turned out, however, that this was not the case, and that the loan was a bad one.

The learned circuit court found that, at the time Dr. Strong loaned the money to the paper company, he was not

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the agent of the claimant to make it, and that he had no power, right, or authority to make such a loan for or on her behalf, and that she had no knowledge of it and never ratified it. The case turns upon the correctness of this finding. The learned counsel for the estate claim that it is erroneous, contrary to the weight of evidence and of all the reasonable inferences to be drawn from it. They insist that it is clearly proven that Dr. Strong, when he received the $1,500, and when he subsequently made the loan to the paper company, was the agent of the claimant and authorized to bind her by his acts in that matter. It is said that it sufficiently appears, and that the fact was, that he was her general agent during all this time; that he had charge of and attended to all her business; and that it is a fair presumption from the facts shown that the loan was made with her authority or understanding. Mr. Malone testified that, in an interview which he had with the claimant after the death of Dr. Strong, she desired him to take the place of the doctor as her agent and legal adviser, and stated in the conversation "that Dr. Strong had been her agent, and had attended to and done all her business for her; . . . that for some time the doctor had acted as her agent, and had entire charge of all her matters." This is the most direct and positive evidence as to the extent of the agency, and it is founded on admissions, which are proverbially of a weak and unreliable nature. The claimant herself contradicts this testimony, and says she made no such statement. And there is some other evidence which tends to prove that Dr. Strong did not attend to all of her business — which was not large or important,— though he did undoubtedly rent a farm for her, collected some rents, aided her in the transaction of her business, took charge of her will and some other papers. But it does not appear that he ever made any other loan for her.

An argument is attempted to be drawn, in support of the

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position that the loan was authorized, from the character of the agency. It is said it was a general agency as distinguished from a special agency, and therefore we must presume that it included the power to make the loan. There is considerable doubt about the evidence showing that it was a general agency. But, assuming for the moment that that fact was fully established, it does not materially aid the case of the estate. The books make a distinction between a general and special agency. Mr. Justice Story says: "The distinction commonly taken between the case of a general agent and that of a special agent, the former being appointed to act in his principal's affairs generally, and the latter to act concerning some particular object. In the former case, the principal will be bound by the acts of his agent within the scope of the general authority conferred on him, although he violates by those acts his private instructions and directions which are given to him by the principal, limiting, qualifying, suspending, or prohibiting the exercise of such authority under particular circumstances. In the latter case, if the agent exceeds the special and limited authority conferred on him, the principal is not bound by his acts, but they become mere nullities so far as he is concerned; unless, indeed, he has held him out as possessing a more enlarged authority." Story, Ag. § 126. Many authorities might be cited which make the same distinction, but it is unnecessary.

This rule of law is founded on public policy, and it is for the protection of innocent third parties. It has no direct bearing upon a case arising between the principal and agent. There the fundamental inquiry is, What did the principal authorize the agent to do, for he is only bound by acts which he authorized. Consequently, if the agent exceeds his powers, makes a contract on behalf of his principal which he had no authority to make, the principal is not bound. These propositions are elementary, but it would

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be unprofitable to continue the discussion of them in this case.

The question here is, Had Dr. Strong authority to make this loan? The *onus* was upon the estate to show that he had such authority. There is no direct or satisfactory proof, according to our understanding of the evidence, that he had. There are probabilities and circumstances of more or less weight which tend to support the view that he would not have made the loan without some authority; but we cannot say they are sufficiently cogent to establish the fact. It is said it is contrary to the usual conduct of prudent persons to leave money with an agent merely for safe-keeping, but that they generally direct the agent to invest the funds so as to produce some income. That may be the usual course of business; but, undisputably, funds are often left with agents for safe-keeping and no other purpose. In this case Dr. Strong held most of the money from October 30, 1882, to April 16, 1883, without investing it; and during this time he did not take up the writing, which surely amounts to a deliberate acknowledgment of indebtedness on his part. In view of these facts, the presumption is as strong that he held the money for safe-keeping, or for some purpose which the testimony does not disclose, as that he received it as an agent to loan for the claimant. Dr. Strong is dead, and the mouth of the claimant is closed as to her object in intrusting the money with him. If, upon the evidence as presented, we should affirm that the purpose and object were to have the doctor loan the money, we should pass from the safe ground of legal proof into the uncertain domain of conjecture and speculation.

Our conclusion therefore is that the sixth finding of the circuit court cannot be disturbed, and that the judgment must be affirmed. The costs of the respondent must be paid out of the estate.

By the Court.— Ordered accordingly.

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THE STATE EX REL. GIBLIN, Respondent, vs. THE SUPERVISORS OF THE TOWN OF UNION, Appellants.

January 13 — February, 1, 1887.

Highways: Lands entirely surrounded: Filing order: Payment of advantages assessed.

Within ten days after the determination of the supervisors to lay out a highway under sec. 1275, R. S., the applicant must pay the amount assessed as advantages and thus secure the filing of the order. If he fails to do so, it will be deemed, under sec. 1269, R. S., that the supervisors have decided against his application.

APPEAL from the Circuit Court for *Rock* County.

In May, 1885, the relator, *William Giblin*, presented to the supervisors of the town of Union his affidavit showing that he was the owner of real estate in such town, which was surrounded by the lands of other persons and was shut out from all public highways, and containing the other averments of fact required by R. S. sec. 1275,[1] and peti-

[1] Sec. 1275, R. S., is as follows: "When any person shall present to the supervisors of any town an affidavit satisfying them that he is the owner of real estate (describing the same) within said town, and that the same is shut out from all public highways, by being surrounded on all sides by real estate belonging to other persons, that he is unable to purchase from any of said persons the right of way over or through the same to a public highway, or that it cannot be purchased except at an exorbitant price, stating the lowest price for which the same can be purchased by him, the said supervisors may in their discretion, after ten and within thirty days, and after giving notice of the time and place of meeting therefor, by posting notices thereof in three of the most public places in said town, at least ten days before the time fixed therefor, proceed to lay out a public highway of not more than three nor less than two rods in width to such real estate, and shall assess the damages to the owner or owners of the real estate, over or through which the same shall be laid, and the advantages to the applicant; but the damages assessed by the supervisors shall in no case exceed the price stated in the affidavit of the applicant; upon laying out such highway, they shall make and sign an order describing the same, and file the same with

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tioned such supervisors to lay out a road from his lands to a public highway, in accordance with that section of the statute. Such proceedings were thereupon had upon such affidavit and petition, that on June 11 of that year the supervisors determined to lay out a highway as prayed, and made an order to that effect on that day, laying out a highway from the relator's land to another highway, over the lands of Orville and Lucy Williams. At the same time they awarded to the former $100, and to the latter $200, as damages, and assessed against the relator $150 as advantages, pursuant to the same statute. The order laying out the highway, and the award of damages and assessment of advantages, were deposited with the proper town clerk on the same June 11, 1885. October 1, 1885, the relator paid the sum so assessed against him to the town treasurer, and thereupon the town clerk filed such order and award in his office, and recorded the order. The relator afterwards requested the supervisors to cause such highway to be opened, but they refused to do so because they doubted the validity of their proceedings in the matter. The relator then applied to the circuit court for a writ of *mandamus* to be issued to the supervisors commanding them to open the highway. An alternative writ was issued, to which the supervisors made return, and after a hearing the circuit court ordered and adjudged that a peremptory writ of *mandamus* issue to the supervisors commanding them to open the highway. From the order and judgment in that behalf the supervisors appeal to this court.

For the appellants there was a brief by *D. L. Mills*, attorney, and *I. C. Sloan*, of counsel, and oral argument by *Mr. Sloan.*

the town clerk, together with their award of damages, which order shall be recorded by said clerk: provided, that the amount assessed as advantages to the applicant shall be paid to the town treasurer before the order for laying out such highway shall be filed."

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For the respondent there was a brief by *Winans & Hyzer*, and oral argument by *Mr. Winans.*

LYON, J. Several objections to the regularity of the proceedings by which the supervisors attempted to lay out the highway in question were made in the argument. We find it necessary to notice but one of them. The proceedings were had under sec. 1275 of the Revised Statutes. That section does not limit the time within which the applicant for the highway shall pay the advantages or benefits assessed against him, but does provide that the amount so assessed "shall be paid to the town treasurer before the order for laying out such highway shall be filed." Were that the only statute on the subject, the courts might be compelled to hold that the applicant for the highway may take his own time to pay or refuse to pay the advantages assessed against him; thus keeping the persons whose lands the supervisors have determined to condemn to the public use in suspense for an indefinite period, as to whether their lands are ultimately to be taken or not, making the final result dependent upon the convenience or caprice of the applicant. That this uncertainty might and probably would interfere with the beneficial use of the land, and seriously embarrass the owner in his plans for the improvement and cultivation of his adjacent lands, is perfectly obvious. Besides, if the applicant delay more than thirty days after the determination of the supervisors to lay out the highway to pay such assessment so that the order may be filed and recorded, it is doubtful, to say the least, whether the owner of the land condemned could then appeal from such determination. It would be found difficult to strain the language of sec. 1276 so as to save in such case the right to appeal.

But there is another statute which, in our opinion, saves the owner of the land taken for the highway from exposure

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to so much injustice at the will or caprice of the applicant. Sec. 1269 provides that "whenever the supervisors shall lay out, alter, widen, or discontinue *any* highway, they shall make out and sign an order therefor, . . . and such order shall be filed and recorded in the office of the town clerk. . . . Such order, together with the award of damages hereinafter mentioned, shall be so filed within ten days after the day fixed by their notice or adjournment for deciding upon such application; and in case said supervisors shall fail to file such order and award within the ten days aforesaid, they shall be deemed to have decided against such application."

The language of sec. 1269 is sufficiently broad to include a highway laid out pursuant to sec. 1275, and we have no doubt that the legislature intended to include therein such highways. Otherwise we should find some limitation of time within which the applicant, under sec. 1275, must pay the assessment against him, to the end that the order and award might be filed in the proper office, and the highway thereby established. Hence we conclude that if the applicant, under sec. 1275, neglects, for more than ten days after the determination of the supervisors to lay the highway, to pay the sum assessed against him as advantages, and thus secure the filing within that time of the order laying the highway, it must be deemed that the supervisors have decided against his application. In this case the relator neglected to pay the assessment against him, and thus obtain the filing of the order and the establishment of the highway, for more than three months. This delay is fatal to the validity of the highway in question. Under no other construction of the statutes on this subject can justice be done to the owner whose property is sought to be taken from him without his consent and against his protest. Neither is it any hardship to the applicant. The highway is laid out chiefly for his benefit, and he should not put the machinery of the law in

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motion for the condemnation of his neighbor's property, theoretically to the public use, practically to his individual use, until he is ready to perform the conditions which the law imposes upon him.

Our conclusion is that the attempt to lay out the alleged highway has failed, and hence that the supervisors should not be required to open it as a public highway.

By the Court.— The order and judgment of the circuit court awarding a peremptory writ of *mandamus* to the supervisors to open the alleged highway is reversed, and the cause remanded with directions to quash the alternative writ and dismiss the proceedings.

TAYLOR, Respondent, vs. DE CAMP, Appellant.

January 13 — February 1, 1887.

Rock county municipal court: Jurisdiction of appeals: Constitutional law: Forcible entry and unlawful detainer.

1. Ch. 197, Laws of 1881, gives to the municipal court of Rock county exclusive jurisdiction of all appeals from the judgments of justices in said county, in both civil and criminal cases; and such act is not unconstitutional.
2. An action for forcible entry or unlawful detainer is a civil case, within the meaning of said act.

APPEAL from the Circuit Court for *Rock* County.

The case is stated in the opinion.

For the appellant there was a brief by *J. W. Bates* and *H. McElroy*, and oral argument by *I. C. Sloan.*

John Winans, for the respondent. [No brief on file.]

TAYLOR, J. This action was originally brought in a justice's court in Rock county, under the forcible entry and detainer act. The case was tried by the justice and a jury,

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and a verdict of guilty rendered against the defendant. From the judgment entered by the justice the defendant appealed to the circuit court of Rock county. The justice made his return to that court, and afterwards, on motion of the respondent, the circuit court dismissed the appeal for want of jurisdiction.

The appeal was dismissed because it was held by the circuit court that the act creating the municipal court of Rock county gave that court exclusive jurisdiction of all appeals from the judgments of justices' courts in that county. The learned counsel for the appellant insists (1) that the act creating said municipal court does not give it exclusive jurisdiction of such appeals; and (2) if it does by its terms give such exclusive jurisdiction, then it is unconstitutional and void.

We think the act creating the said municipal court clearly and in express terms gives exclusive jurisdiction to such court of all appeals from justices' courts in said county. The language of the statute is as follows: "Said court may exercise powers and jurisdiction equal and concurrent with the circuit court of Rock county in all cases of crimes and misdemeanors arising in said county, except murder. Such jurisdiction includes the right to try and determine all appeals in civil and criminal cases from justices of the peace or police justices of said county. . . . Said court shall have jurisdiction to try and determine all appeals in civil and criminal cases from justices of the peace and police justices in said county, and in all cases removed from said justices' or police courts on account of the title to lands coming in question, and all such cases shall be certified and returned to said municipal court, instead of the circuit court of said county, within ten days after the perfection of the appeal in appealed cases, or the joining of issue in other cases." [Sec. 1, ch. 197, Laws of 1881.] There does not seem to be any reasonable doubt, from the language above

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quoted, that it was intended by the legislature to give the municipal court exclusive jurisdiction of all appeals from the judgments of justices in said county in both civil and criminal actions.

The proceeding under the forcible entry and unlawful detainer chapter of the Revised Statutes is declared to be an action in a justice's court. See sec. 3362, R. S. Sec. 2597 says: "Actions are of two kinds, civil and criminal;" and a criminal action is one prosecuted by the state as a party against a person charged with a public offense, for the punishment thereof; and every other action is a civil action. This action is not prosecuted by the state, and, within the definition of actions, is a civil action. Sec. 3368, which provides for an appeal, treats it as an appeal from a judgment in a civil action. The case comes clearly within the language of the act conferring exclusive jurisdiction upon the municipal court.

The other objection, that the act is void so far as it confers exclusive jurisdiction of such appeals upon the municipal court, has been so often discussed and decided by this court adversely to the claim now made by the learned counsel for the appellant that we deem it unnecessary, if not improper, to go over the discussion again in this case. A citation of the decisions is all that seems called for in this case. *Harrison v. Doyle*, 11 Wis. 83; *McNab v. Noonan*, 20 Wis. 434, 443; *Geise v. Greene*, 49 Wis. 334, 339; *Raynor v. State*, 62 Wis. 289, 293; *Bookhout v. State*, 66 Wis. 415. These cases have settled the question in this state that the legislature may limit or take away the appellate jurisdiction of the circuit courts of this state, in certain designated cases, and vest such jurisdiction in other courts. This was done by the first act of the legislature giving civil jurisdiction to county courts in 1849.[1] That law provided

[1] R. S. 1849, ch. 86, secs. 23, 24.—REP.

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that "no appeal to the circuit court shall be made or allowed of any cause tried or determined by the county court, except in probate cases; but in all cases of judgment rendered in such courts either party thinking himself aggrieved or injured by such judgment may remove the same by appeal or writ of error to the supreme court," etc. This power of the legislature to take away the appellate jurisdiction of the circuit court in such cases was upheld by this court in the case of *Harrison v. Doyle*, in 1860. That case has been followed from that time down to the decision in *Bookhout v. State*, in 1886. If there be any question to which the rule of *stare decisis* ought to be applied by this court, we think it should be applied to this question.

By the Court.— The order of the circuit court is affirmed.

THE STATE, Appellant, vs. CARPENTER, Respondent.

January 14 — February 1, 1887.

Navigable river: Obstruction: Injunction.

Rock river in this state is a public, navigable river, which it is unlawful to obstruct. But it appearing that the navigation of the river at Janesville has long been abandoned, and that the stream there is already so filled with obstructions by dams and bridges that it is not navigable in fact, the erection of a building in the river at that place, which would not materially obstruct or abridge the use of the river for navigation if such use were needed, will not be restrained at the suit of the attorney general.

APPEAL from the Circuit Court for *Waukesha* County.

The case is stated in the opinion.

For the appellant there was a brief signed by *A. A. Jackson*, of counsel; one signed by *William Ruger* and *Fethers, Jeffris & Smith*, of counsel; and one signed by the *Attorney General*, and by *William Ruger, Fethers, Jeffris & Smith*,

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and *A. A. Jackson*, of counsel; and the cause was argued orally by *Mr. Jackson* and *Mr. Fethers*. They contended, *inter alia*, that the river being a navigable river and a public highway, the respondent has no right to place an obstruction therein without the consent of the legislature. R. S. secs. 1596, 1598; *Jones v. Pettibone*, 2 Wis. 308, 318; *Wis. R. Imp. Co. v. Lyons*, 30 id. 61, 65–67. Any obstruction placed in such a river would be a public nuisance; and the creation of such a nuisance may be prevented by injunction. *Walker v. Shepardson*, 2 Wis. 384, 395–6; *S. C.* 4 id. 486, 511; *Barnes v. Racine*, id. 454, 465–6; *Yates v. Judd*, 18 id. 118, 127–8; *Enos v. Hamilton*, 24 id. 658; *Neff v. Paddock*, 26 id. 546, 552; *Potter v. Menasha*, 30 id. 492; *Stevens Point Boom Co. v. Reilly*, 46 id. 237, 243; Wood on Nuisances, sec. 484; *Williams v. Smith*, 22 Wis. 594, 601; *Wis. R. Imp. Co. v. Lyons*, 30 id. 61, 67; *Att'y Gen. v. Eau Claire*, 37 id. 400; *Pettibone v. Hamilton*, 40 id. 402, 416. The placing of an obstruction in a navigable stream so as to impede the navigation thereof is a public wrong, and the attorney general may maintain an action in the name of the state to restrain such public wrong. *State v. St. Croix Boom Corp.* 60 Wis. 565, 570; *Att'y Gen. v. Railroad Cos.* 35 id. 425, 529; *Att'y Gen. v. Eau Claire*, 37 id. 400.

Rock river being navigable as a matter of law, it is unimportant in this case whether it is navigable in fact or not. But it is navigable in fact. *Whisler v. Wilkinson*, 22 Wis. 576; *Sellers v. Union Lumbering Co.* 39 id. 525; *Olson v. Merrill*, 42 id. 203; *Cohn v. Wausau Boom Co.* 47 id. 324; *Weatherby v. Meiklejohn*, 56 id. 76. It is not necessary that a river should be navigable at all times, or even the greater part of the year, to sustain its character as navigable. *L. R. M. & T. R. Co. v. Brooks*, 39 Ark. 403; *S. C.* 43 Am. Rep. 277–279; *Olson v. Merrill*, 42 Wis. 203; *Morgan v. King*, 35 N. Y. 454–459; *Shaw v. Oswego Iron Co.* 10 Oregon, 371; *S. C.* 45 Am. Rep. 146–154; 31 Mich. 336–343; 72 Ala.

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456–459. Nor is it essential that it shall be navigable continuously throughout its whole length. *Brown v. Chadbourn*, 31 Me. 9, 25. It is claimed that the navigation in Rock river is interrupted by dams and bridges. But if the river was in its natural state a navigable stream, the placing of unlawful obstructions in it would not deprive it of its navigable character. Nor will the fact that a navigable stream has not been used by the public deprive it of its navigable or public character.

It is insisted by the respondent that if Rock river was ever navigable in fact the state has destroyed its navigable character by authorizing the construction of dams and bridges across it, and that the state is now estopped from claiming that the river is a navigable stream. An examination of the various acts of the legislature authorizing the construction of such dams and bridges will show that this claim is wholly without foundation and that in nearly every act the navigable character of the river is recognized and protected. As to dams, see Laws of 1839, No. 45, p. 83; Laws of 1839, No. 49, p. 98; Laws of 1841, No. 69, p. 143; Laws of 1842, p. 9; Laws of 1843, pp. 25, 34; Laws of 1844, p. 36; Laws of 1845, p. 99; Laws of 1847, p. 16; Laws of 1848, p. 13; Laws of 1849, ch. 78; Laws of 1850, ch. 94. As to bridges, see Laws of 1842, pp. 53, 55, 80; Laws of 1845, pp. 105, 106; P. & L. Laws of 1855, ch. 71; P. & L. Laws of 1856, ch. 263; Laws of 1881, ch. 70; Laws of 1883, ch. 67. The legislature has also recognized and attempted to protect the navigable character of Rock river, in the charter of the city of Janesville. P. & L. Laws of 1857, ch. 372, secs. 1, 2; P. & L. Laws of 1858, ch. 108, subch. 4, sec. 4, subd. 36, and sec. 16; P. & L. Laws of 1866, ch. 474, subch. 4, sec. 4, subd. 36, and sec. 16; Laws of 1882, ch. 221. By the Ordinance of 1787, the constitution, and the statutes it was settled as the law of the land that Rock

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river was a navigable stream and could not be obstructed. Every act of the legislature authorizing a bridge or dam across the river must be construed accordingly, and so far as it attempted to authorize an erection which would destroy or seriously obstruct the navigation of the river it would be void. The navigable character of the river having been fixed by the Ordinance, the legislature cannot by anything that it may do or fail to do, destroy such character. *Cox v. State*, 3 Blackf. 193–6; *Hogg v. Zanesville C. & M. Co.* 5 Ohio, 410; *Spooner v. McConnell*, 1 McLean, 337; *Wis. R. Imp. Co. v. Lyons*, 30 Wis. 61–66; *Att'y Gen. v. Eau Claire*, 37 id. 400–446; *Sweeney v. C., M. & St. P. R. Co.* 60 id. 60–67. The mill-dams and bridges across Rock river are for a public use, and such public use is in entire harmony with the public use of the river as a highway. The construction of a dam or bridge across the river under an act of the legislature, in an unlawful manner or in a manner not authorized by the act, cannot be construed into an abandonment by the state of the navigable character of the river. Such a dam or bridge would be a nuisance, and could be removed in a proper proceeding. If the state has so far acquiesced in the continuance of an unlawful dam or bridge as to estop it from proceedings to remove the same, such estoppel will not protect the respondent in his effort to place in the river another and different unlawful obstruction. But the state is not estopped from removing any nuisance whenever discovered, no matter how long it has continued. *Rochester v. Erickson*, 46 Barb. 92; *Mills v. Hall*, 9 Wend. 315; *Wright v. Moore*, 38 Ala. 593; *Comm. v. Upton*, 6 Gray, 473; *Stoughton v. Baker*, 4 Mass. 522; *People v. Cunningham*, 1 Denio, 524, 536; *Renwick v. Morris*, 3 Hill, 621, 623.

The amount of navigation and the extent of the obstruction are not to be considered. If the building will be an

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obstruction to any extent it will be an unlawful obstruction. *Wis. R. Imp. Co. v. Lyons*, 30 Wis. 61–67; *Att'y Gen. v. Eau Claire*, 37 id. 400, 447.

The respondent claims to be the owner of 40 by 100 feet of land in the bed of the river. He does not claim to own any land on the bank of the river. He is not therefore a riparian owner, and possesses none of the rights called riparian rights. Gould on Waters, sec. 148; *Mariner v. Schulte*, 13 Wis. 692; *Chapman v. O. & M. R. R. Co.* 33 id. 629; *Delaplaine v. C. & N. W. R. Co.* 42 id. 214; *Diedrich v. N. W. U. R. Co.* id. 248, 264.

Edward M. Hyzer, for the respondent.

Orton, J. This is a bill or information of the attorney general against the defendant praying for an injunction to restrain him from driving piles within the channel and low-water mark of Rock river, within the city of Janesville, as a foundation for the construction thereon of a large building 40 by 100 feet, which he threatens, and which, when so constructed, and the interruption of said river for the purpose of navigation caused thereby, "*will cause great public inconvenience, mischief, and damage*," and "interrupt and prevent the free use and enjoyment of the waters of said river for the purpose of navigation, and *will cause great, irreparable*, and *permanent injury in that regard*." It is alleged that "said river *is navigable in fact* for steamboats, barges, timber, lumber, rafts, and other water-craft, and for the purpose of floating productions and manufactured articles to market, and for the people of the county to travel upon for profit or pleasure, and is so navigable in said county and city at the particular place" where the defendant threatens to erect said building therein, and that the defendant has no lawful authority to erect said building in such place. A preliminary injunction was granted by a court commissioner on said complaint and affidavits in support thereof, which,

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on answer and affidavits in support thereof, was dissolved by the circuit court, and from the order dissolving the same this appeal is taken.

It appears that the building so threatened to be constructed will occupy that portion of a lot in the city of Janesville, within said river, belonging to said defendant by conveyance of the owner of the lot, and situated between two bridges over said river, built upon piles, and without draw or swing and within forty rods of each other, and in the vicinity of a building in the center of said river; that dams and bridges span said river within said city in many places, which prevent the use of said river for navigation, and many buildings have been built out into said river from adjacent lots, by the owners thereof, and that such obstructions have existed for a great many years; and that practically and in fact said river has not been and could not be used for navigation, and that there has been no necessity or need for such an use of said river during a very long time past; and that the construction of said building would not materially obstruct or abridge such use if required, because a sufficient channel and space of said river would thereafter remain for such purpose. It does not appear that the public or any one needs or requires, or that any exigency demands, the use of said river within said city for the legitimate purposes of navigation at this time.

These facts, which sufficiently appear in the record, would seem to negative the allegations of the complaint that said building would "cause great public inconvenience, mischief and damage," and "great, irreparable, and permanent injury," by the interruption of the navigation of said river. Outside the record, we may take judicial knowledge that said river, for a great many years, within cities and villages and in other places, has been obstructed by mill-dams, bridges, and buildings, in a similar manner, through this state and the state of Illinois, and that said river has not

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been practically and in fact navigable or used, needed, or required for navigation in the way of transportation or travel. This being the condition of Rock river within the city of Janesville and elsewhere, was it an abuse of discretion for the circuit court to dissolve the injunction? Perhaps the question should be broader than this, in order to settle, for the time and under the present conditions, the question whether an injunction at the suit of the attorney general ought to have been granted or continued in such a case.

The legal proposition made and urged with great learning and ability by the learned counsel of the appellant, in respect to the navigability of Rock river, as far as the Ordinance of 1787, the constitution, and many laws of the state can make it so, is incontrovertible, and this court is bound to take judicial knowledge that it is a navigable stream and public river of this state; and that it is unlawful to obstruct it there can be no question. The public and all persons have the right to its free and unobstructed use for the purposes of navigation at all times and under all circumstances. There was a time, in the early settlement of the country bordering on this river, when it was practically and in fact navigable, and actually used to a limited extent for the floating of logs, and perhaps for small boats and barges. But since that region has been denuded of its forests, and other and better means for transportation have come into use, such practical use of the river has been entirely abandoned, and its waters have been exclusively used by riparian proprietors and for hydraulic purposes, and it has been spanned by highway and railway bridges and mill-dams in near proximity with each other throughout its entire course. We shall see that these considerations and conditions cannot be ignored in a case like the present one, where a court of equity is asked by the attorney general, on behalf of the public, for an injunction to restrain a single encroachment

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upon the waters of this river, which at most will not much increase the obstructions which have for a long time existed to its technical and legal navigability.

In this state, at least, there is no such thing as *purpresture*, even in connection with its navigable waters, where the owner's title to the adjacent banks extends to the center of the stream and he is in most respects a riparian proprietor. Such an owner may use his marginal land in his own way, so that he does not obstruct, impede, or abridge the navigability of the river. His right is only subordinate to such public use. This has been so often decided by this court that the cases need not be cited. Such is not the common law, or the law of many of the states. Purpresture is based upon the title of the sovereign or of the state to the land or soil between high and low water mark of navigable waters, and was good cause for an injunction even when the encroachment was not a nuisance *per se* or by reason of obstructing navigation. 2 Story's Eq. Jur. sec. 922; *Blundell v. Catterall*, 5 Barn. & Ald. 268; *Attorney General v. Johnson*, 2 Wils. Ch. 101; *People v. St. Louis*, 5 Gilman, 367; Houck, Rivers, secs. 300–310; Ang. Watercourses, sec. 546. If the act was a purpresture, it was liable to be abated or restrained in equity as an invasion of the property of the crown or of the state. 1 High, Inj. sec. 760. In this case, then, an injunction could not have been granted on that ground, for the defendant had the right to use the shore as a riparian proprietor, if he did not thereby obstruct, impede, or abridge the navigability of the river. It was only on the ground that it threatened to be a public nuisance for that reason that it could be enjoined.

It seems that there have always been great doubts as to the interference by a court of equity to grant an injunction against a threatened public nuisance. Ang. Watercourses, sec. 566; *Attorney General v. Railroad & Transp. Co.* 3 N. J. Eq. 136. It is in cases of public nuisances requir-

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ing *immediate* suppression that the chancery courts of the United States have jurisdiction. *Georgetown v. Canal Co.* 12 Pet. 91; *Rowe v. Granite Bridge Corp.* 21 Pick. 344. In other cases courts of law should be appealed to, when the facts can be passed upon by a jury. The jurisdiction of a court of equity to restrain public nuisances at the suit of the attorney general is one of great delicacy, and should not be exercised except to arrest *irreparable injury.* Ang. Highw. sec. 280. When the public owns not only the easement but the soil of rivers, and the nuisance is also a purpresture, this equitable relief will meet with greater favor. Id. sec. 282. But even then the threatened nuisance should be such as may injuriously *affect* or *endanger* the *public interest. Attorney General v. Cohoes Co.* 6 Paige, 133. "To warrant an injunction against a public nuisance, it must clearly appear that it is such *in fact;* and if it be doubtful the relief will not be granted, and the question as to the existence of the nuisance should be determined by a jury before it is granted." *Attorney General v. Cleaver*, 18 Ves. 217. A nuisance has been defined by this court to be "something which works *hurt*, *inconvenience*, or *damage*." *Douglass v. State*, 4 Wis. 387. "Any act or obstruction which unnecessarily *incommodes* or *impedes* the lawful use of a highway by the public is a nuisance." Ang. Highw. sec. 223. "Where the injury complained of is not *per se* a nuisance, but may or not become so according to circumstances, and when it is *uncertain*, *indefinite*, or *contingent*, or productive of only *possible* injury, equity will not interfere." 1 High, Inj. sec. 742, and cases cited in note 4.

The nuisance does not consist in obstructing the river, but in obstructing *the use* of the river as a navigable stream by the public. The defendant may have no right whatever to erect a building in it that may obstruct the navigation of Rock river, and by doing so he may be technically guilty of a public wrong. But that is not the question. Where is

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the immediate hurt, injury, inconvenience, or peril of the public, in this threatened construction, that a court of equity should be called upon to exercise this extraordinary and questionable jurisdiction to enjoin it? If completed as threatened, the public may not for many years, and probably never, suffer any injury or inconvenience from it. The river has not been navigable in fact, or navigated or used or needed for such purpose, for many years, and probably never will be again. The wrong and injury to the public, if any, are merely technical and nominal. Courts of chancery should not be called upon to exercise this high jurisdiction in a case where it is needless and useless, and a mere idle ceremony. *Cui bono?* In order to have the character of navigability, this river should be navigable in fact, or navigable to some purpose useful to trade or agriculture, and must be generally and commonly useful for such purpose, if courts are called upon to interfere to protect its navigability. Ang. Watercourses, sec. 544, and cases cited in note 2.

In *Attorney General v. Railroad & Transp. Co., supra*, an injunction was denied, although the information charged "that great mischief and irreparable injury would ensue to the public by the erection of the bridge." Very similar allegations are made in this information, which, however, were negatived by the facts.

In 1 High, Inj. sec. 770, it is said in the text: "The only ground upon which the obstruction of a navigable creek can be enjoined is the hindrance to navigation; and where the stream is not *in fact navigated*, and has not been for many years, the injunction will be denied."

The case cited to this text is *Gilbert v. Morris Canal & Banking Co.* 8 N. J. Eq. 495. This case is very much in point. Mill creek is a tide river, and empties into the bay of New York, and in its natural state was navigable for lighters and vessels of fifty tons burthen quite a distance

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up into New Jersey, and had public wharves or landings thereon. But for many years it had not been used for navigation, and bridges without draws had been built across it, and railroad embankments had filled it up in some places. The defendant threatened to make a canal across it, and the plaintiffs prayed for an injunction, on the ground that said canal would be a public nuisance by obstructing a navigable stream where the tide ebbed and flowed. The language of the opinion of the chancellor is so appropriate that I may be allowed to make a copious quotation of it: "The creek is large enough in width and depth of water, for useful purposes of navigation, if any such navigation were *wanted*, or would, with the present means of communication with New York, be ever used. . . . I cannot say that the shutting up of the creek would be a *public nuisance*, as obstructing *public navigation;* and this is the only ground on which this court could interpose. An individual may come into this court, if he is about to be injured by the creation of a public nuisance, for an injunction; but in this case it is evident that the *public* do not and would not use this creek for the purposes of navigation. There is a bridge over this creek without a draw, and has been for eleven years, and the public have taken no step to open it for navigation." This is the only case of similar facts I have been able to find, and probably is the only one that has come before the courts.

It is not probable that any one, much less the attorney general, would concern himself about a stream which has been so long abandoned for all purposes of navigation, and completely obstructed in so many places, and not needed or used for such purposes, and neither the public nor individuals have suffered any injury or inconvenience thereby. When any one in good faith shall have the means of using this river for the legitimate purposes of navigation, and shall desire to use the same for such purposes, it will be

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time enough for him or the attorney general to complain; and the courts of law will afford, in such an exigency, an ample remedy. In the above case the stream was a tide river, and there was no more question of its being a navigable stream in the eye of the law than in the case of Rock river, and it had not been closed up by obstructions, and not used or needed for purposes of navigation, more than half the length of time. This, therefore, is much the stronger case for a denial of equitable relief.

We do not think that the circuit court abused its discretion in dissolving the injunction, and are inclined to hold that the information and the facts do not make a proper case for an injunction at the suit of the attorney general.

By the Court.— The order of the circuit court is affirmed.

WOLD, Respondent, vs. ORDWAY, Appellant.

January 14 — February 1, 1887.

(1) Justices' courts: Appeal: New judgment: Interest. (2) Costs: Reversal of judgment.

1. Where a justice's judgment for less than $15 is affirmed, a readjudication by the appellate court that the respondent recover the amount of such judgment together with interest thereon from the time of its rendition, will not be deemed a new judgment or anything more than a simple affirmance.
2. A judgment affirming a justice's judgment was set aside, and after a rehearing a new judgment of affirmance was rendered which included costs to the amount of $9.69 in addition to the costs recovered in the previous judgment of affirmance. It did not appear what such excess was for, but no specific objection thereto was made in the circuit court. *Held*, that the judgment would not be disturbed on account of such excess.

APPEAL from the Circuit Court for *Dodge* County.

The case is thus stated by Mr. Justice CASSODAY:

This action was to recover eight dollars, the alleged

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agreed purchase price of a pair of boots alleged to have been made by the plaintiff for the defendant upon his order, but which he refused to take or pay for. In addition to denials, the answer alleged a failure of performance of the contract on the part of the plaintiff, in that the boots did not fit the defendant. On the trial in the justice's court, the plaintiff recovered judgment for $8 damages and $6.87 costs, making $14.87. The defendant appealed to the circuit court for Sauk county. The venue was then changed to the circuit court for Dodge county, wherein it was duly brought to a hearing by the plaintiff's counsel (no one appearing for the defendant), November 28, 1884, and on motion of the plaintiff it was ordered and adjudged, in effect, that the said judgment be in all things affirmed; that the plaintiff recover of the defendant the amount of said judgment, to wit, $14.87, with interest thereon from the rendition thereof, amounting in all to $17.88, together with his costs, adjudged at $20.90, which amounted in the whole to $38.78; and that he have execution therefor. An execution was thereupon issued and delivered to the sheriff, January 3, 1885, and January 14, 1885, the sheriff served the execution on the defendant. Thereupon, and on the same day, an order was made by the trial court, staying all proceedings in the action, and served upon the sheriff. On the same day an order was made by the court for the plaintiff to show cause why the judgment and execution should not be vacated and set aside, "for the reason that said judgment was contrary to stipulation of parties in open court." That motion was heard, and then determined by the court, February 10, 1885, whereupon it was ordered that said judgment be vacated and set aside; that the sum of $10 be allowed to the prevailing party upon the final determination of said cause as taxable costs upon said judgment and motion, and, in case said plaintiff shall prevail, $3.75 additional costs made upon said execution; that the cause be

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placed upon the calendar for trial at the same term. The cause was then reheard, and the circuit court thereupon, and on July 7, 1885, ordered and adjudged, in effect, that the judgment rendered by the justice of the peace be, and the same was thereby, in all things affirmed; that the plaintiff recover of the defendant the amount of that judgment, to wit, $14.87, with the interest thereon from its rendition, amounting to $3.50, making $18.37; that he also recover the amount of his costs, adjudged at $43.34, which amounted in the whole to $61.71; and that he have an execution thereon. From that judgment the defendant appeals.

H. L. Eaton, for the appellant.

For the respondent the cause was submitted on the brief of *E. C. Lewis*.

Cassoday, J. The judgment in the justice's court, exclusive of costs, was less than $15. This being so, and there being no affidavit of any larger claim, the appeal was necessarily heard on the original papers and the return of the justice. Sec. 3767, R. S. It was so heard. Upon such hearing the court was expressly required, in effect, to give judgment according to the justice of the case, without regard to technical errors or defects which did not affect the merits; and, in giving judgment, to affirm or reverse the judgment of the court below, in whole or in part, either as to damages or costs or both, as to any and all the parties, and for errors of law or fact. Sec. 3769, R. S. In other words, the jurisdiction upon such an appeal is purely appellate. This has often been determined. Here the judgment in the justice's court was wholly affirmed, both as to damages and costs,—first on default, and then, after being reopened, again on a rehearing. This being so, the plaintiff was entitled, as a matter of law, to interest on the amount of that judgment from the time of its rendition. The mere fact that the amount of such interest was com-

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puted to the time of such affirmance, and recited in the judgment, together with the total amount of the two combined, with a readjudication that the plaintiff should recover the same, did not make it a new judgment or anything more than a simple affirmance. Upon such affirmance, the plaintiff was entitled to $10 costs, and all disbursements and officer's fees. Sec. 2925, R. S. On such affirmance, November 28, 1884, the plaintiff recovered $10 for attorney's fees, and $10.90 for clerk's fees and disbursements, making $20.90. The setting aside of the default "for the reason that the judgment was contrary to stipulation of parties in open court," was undoubtedly addressed to the sound discretion of the circuit court, and hence no error was committed in allowing the plaintiff, as a condition of granting said motion, $10 costs, and $3.75 sheriff's fees upon the execution. In the judgment entered after the rehearing, to wit, July 7, 1885, the plaintiff recovered $43.34 for his costs; that is to say, $9.69 more than the aggregate costs recovered in the judgment of November 28, 1884, and the amounts allowed upon the motion. Just what such excess was for does not appear, nor does it appear whether any objection was made to the same in the trial court. Presumptively it was for clerk's fees on the motions and the rehearing. However that may be, we are not disposed to disturb the judgment merely because the costs were increased that amount, especially as no specific objection appears to have been made thereto in the trial court.

By the Court.—The judgment of the circuit court is affirmed.

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WEYER, Respondent, vs. THE CHICAGO, WISCONSIN & NORTHERN RAILROAD COMPANY, Appellant.

January 14 — February 1, 1887.

RAILROADS: CONDEMNATION OF LAND. *(1) Damage to land not taken: What may be considered. (2) Value of land taken: Probable income. (3) Instructions to jury: Immaterial error.*

1. Where a portion of a farm has been taken for a railroad, the damage to the other portion by reason of such taking is the depreciation in its market value, and in determining this the jury may consider the smoke, noise, danger and inconvenience of working the farm in consequence of the road running through it. But these things do not of themselves constitute a basis for separate and distinct damages.
2. In estimating the value of land taken for a railroad, the jury may take into consideration its productiveness, or the income which might have been derived from it if it had not been taken.
3. The jury were instructed that, in determining the value of land taken and the damage by reason of such taking, they could not give less than $375 nor more than $1,750, if these were the highest and lowest estimates of the witnesses. As a matter of fact the estimate of one witness was $350. The jury found a verdict for $1,012.50. *Held*, that the railroad company could not have been prejudiced by the instruction.

APPEAL from the Circuit Court for *Washington* County.

The defendant railroad company instituted proceedings for the condemnation of a strip of land 100 feet wide, comprising three and 48–100 acres, across a farm which the plaintiff claimed to own. The commissioners of appraisal awarded the sum of $300 as compensation for the land taken and for the damage sustained by reason of such taking. This amount was paid into court. The plaintiff appealed from such award to the circuit court, and there obtained a verdict fixing the value of the land taken at $262.50, and the damage to the balance of the farm at $750. From the judgment on this verdict the defendant appeals. Other facts are stated in the opinion.

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For the appellant there was a brief by *Howard Morris*, attorney, and *A. A. Krause*, of counsel, and oral argument by *Mr. Krause.*

For the respondent there was a brief by *P. & T. O'Meara*, and oral argument by *Mr. P. O'Meara.*

COLE, C. J. The errors assigned in this case are to certain portions of the charge, and to the refusal of the court to give an instruction.

First. It is claimed that the court erroneously instructed as to the measure of damages. The court submitted two questions to the jury: "(1) What was the fair market value of the three acres and a half, in round numbers, actually taken by the railroad? (2) What was the damage to the balance of the plaintiff's farm by the construction of the defendant's road through said farm?" The learned circuit judge made some pertinent remarks in regard to the first question, which were applicable to the evidence and to which no exception was taken. In respect to the second question the learned judge said: "In determining that question, you are to take into consideration all the circumstances surrounding the case,—the location of the farm, the manner in which the road runs through it,— and you are to take into consideration also the inconvenience, trouble, and dangers, if there are any of these things, in working that farm in consequence of the road running through it. You are to take into consideration, also, whether this spring spoken of has been affected, or whether it has made it more difficult for the party to have access to it. You are to take into consideration the proximity of this road to the house and other buildings of the plaintiff; the smoke, noise, danger and inconvenience in working this farm, if any." This last clause is the one excepted to as being erroneous.

It is objected that in this clause the court directed the jury that damages might be assessed for smoke, noise, the

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danger and inconvenience of working the farm; that these things of themselves constituted a proper basis for damages. But we do not so understand the charge, nor do we think the jury could have so understood it. But, in determining the question as to the actual depreciation of the market value of the balance of the farm resulting from the construction of the road through it, these things were proper to be considered, because they had some bearing on the main fact to be established. They could likewise be taken into account as means for weighing the opinions of the witnesses who had testified as to the depreciation. On cross-examination the witnesses were generally asked the grounds or reasons for placing the depreciation at the amount named by them, respectively; and they, in effect, stated that the proximity of the road to the house and building, smoke, noise, danger and inconvenience in crossing the railroad track, and other things did in their opinion diminish the value of the land not taken. This evidence was given without objection, for the purpose, doubtless, of testing the value of the witnesses' opinions upon the subject. It is, perhaps, common knowledge and experience that the value of such farm property in the markets of the world is more or less affected by a railroad crossing in the manner the defendant's road crossed this farm; that is, people in purchasing such property will give less for it than they would if the railroad were not there. The statute provides that the owner shall receive compensation for the value of the tract taken, and the damages sustained by reason of the taking thereof. Sec. 1848, R. S. Consequently, by as much as the market value of the residue has been diminished in consequence of such crossing and the incidental inconvenience, danger, and annoyance thereof, by so much has the owner been injured. And it matters not what causes the depreciation in value, whether exposure to fire, or danger to person and property, the real question is, and always should be,

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How much has the market value of the property been diminished by reason of the road crossing the farm? This was the rule laid down in the *Snyder Case* [*Snyder v. W. U. R. Co.* 25 Wis. 60], and it has been substantially adhered to in subsequent cases. At the same time it has been said that danger from fire by passing trains, or the liability of horses to get frightened from the same cause, or noise or inconvenience arising from the proximity of the premises to the railway track, are not such injuries as will authorize separate and distinct damages, being too remote. *Hutchinson v. C. & N. W. R. Co.* 37 Wis. 582; *S. C.* 41 Wis. 555. These things are never to be taken into account *as a basis or ground for awarding damages*, because they rest upon sources of injury too remote and conjectural.

When the entire charge is considered, we do not think there is anything in it which could have misled the jury as to the proper measure of damages. They must have understood that they were to determine from all the testimony what was the fair value of the land taken, and what damage was done to the residue of the farm. They were told that they were to apply their common sense and experience to the testimony, and test the value of the opinions of the witnesses by the facts upon which such opinions were based.

In their verdict, the court in substance told them that they could not give less than $375 nor more than $1,750, if these were the highest and lowest estimates of the witnesses. As a matter of fact, one witness placed the value of the land taken and the damage to the residue at $350. But it is perfectly obvious that the defendant could not have been prejudiced by the charge on this point. The jury found a verdict of $1,012.50 for the land taken and for damage to the balance of the farm.

The court was asked to instruct the jury that they had no right to take into consideration the income that might

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have been derived from the strip of land taken if it had not been taken. The court properly refused to give the instruction. In estimating the value of farming land, its productiveness, or the income which may derived from it, is always considered. Indeed, there is no better nor safer criterion than this to get at its real value. It is said some of the plaintiff's witnesses, in their estimate of the value of the land taken, and others in estimating the damages, include the probable future income of the land either as an element of damage, or in addition to value and damages. All this testimony was admitted without objection; and, whether proper or improper, it is too late now to say it should have been excluded.

On the whole case, we think that the judgment is correct and must be affirmed.

By the Court.— Judgment affirmed.

MILLER, Administratrix, etc., Appellant, vs. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

January 14 — February 1, 1887.

Railroads: Negligence: Presumption: Nonsuit.

The evidence in this case — showing that the plaintiff, while standing on a side track of the defendant's railway in front of a car loaded with lumber belonging to him, which had been left there to be unloaded, was run over and killed by such car, which was struck and set in motion by other cars which had been standing on the same track, but not showing what force set the other cars in motion, what the grade of the side track was, the customary manner in which such track had theretofore been used, or that any employee of the defendant was about such side track when the accident happened or before — is *held* not to raise a sufficient presumption of negligence on the part of the defendant to require the submission of that question to the jury.

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APPEAL from the County Court of *Dodge* County.

On May 7, 1884, the plaintiff's intestate was run over by a car on the railway of the defendant company, at Horicon, and killed. This action was brought by his widow, who had been theretofore duly appointed administratrix of his estate, to recover damages therefor. The complaint alleges that the death of the intestate was caused by the negligence of the defendant company. The answer denies the negligence charged, and alleges that the deceased came to his death through his own negligence.

On the trial, after the plaintiff had introduced her proofs and rested her case, the court ordered a nonsuit, and judgment for the defendant was accordingly entered, dismissing the complaint with costs. The plaintiff appeals from such judgment.

A sufficient statement of the testimony will be found in the opinion.

For the appellant there were briefs by *Jenkins, Winkler, Fish & Smith*, and oral argument by *Mr. Winkler*. They contended, *inter alia*, that the deceased had a right to be about the car upon any reasonable errand connected with his property upon the car. He had a right to expect that if it became necessary to move the car it would not be done without some signal or warning to persons who might reasonably be expected to be about it, and there can be no question that the defendant ought to have anticipated that the deceased was likely to be about the car for some purpose connected with his property upon it. The car stood on the edge of the highway, and for that reason alone the deceased had a right to assume that it would not be pushed into or across the highway without warning. See *McKone v. Mich. Cent. R. Co.* 51 Mich. 601; *Watson v. W., St. L. & P. R. Co.* 66 Iowa, 164; *Ill. Cent. R. Co. v. Shultz*, 64 Ill. 172; *Holmes v. N. E. R. Co.* L. R. 4 Exch. 254; *Doss v. M., K. & T. R. Co.* 59 Mo. 27.

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For the respondent there was a brief signed by *John W. Cary*, attorney, and *Burton Hanson* and *F. W. Downer, Jr.*, of counsel, and the cause was argued orally by *Mr. Hanson.* They argued, among other things, that there was a complete failure of proof as to the material allegations of the complaint. The presumption is that the defendant was free from negligence, and though a general allegation of negligence may be sufficient in a complaint, the plaintiff must show upon the trial some definite act or omission on the part of the defendant upon which he bases his right to recover. *Daniel v. Metropolitan Railway*, L. R. 3 C. P. 591; *Higgs v. Maynard*, 14 L. T. (N. S.), 332; *Toomey v. L., B. & S. C. R. Co.* 3 C. B. (N. S.), 146; *Wood v. C., M. & St. P. R. Co.* 51 Wis. 196; *Cahill v. Layton*, 57 id. 600; *Lockwood v. C. & N. W. R. Co.* 55 id. 50; *Stevenson v. C. & A. R. Co.* 5 McCrary, 634; *Kendall v. Boston*, 118 Mass. 234; *Bremmer v. G. B., St. P. & N. R. Co.* 61 Wis. 114; *Denby v. Willer*, 59 id. 240; *Sorenson v. Menasha P. & P. Co.* 56 id. 338; *Steffen v. C. & N. W. R. Co.* 46 id. 259; *Abbott v. Freeman*, 35 L. T. (N. S.), 783; *State v. B. & O. R. Co.* 58 Md. 221; *P., W. & B. R. Co. v. Stebbing*, 62 id. 504; *Phil. & R. R. Co. v. Schertle*, 97 Pa. St. 450, 455.

LYON, J. One of the railroads of the defendant company from Milwaukee to Portage city runs nearly west through the village of Horicon, and is intersected at that place by what is known as the Berlin Branch, another railroad of the defendant, which enters Horicon from the northwest. South of the main track of the Portage Branch in such village are two side tracks, which connect with the main track at both ends. These side tracks are parallel to each other, and appear by a map in evidence to be each about 1,200 feet in length. About 300 feet west of the east end of these side tracks a traveled road crosses all of the railroad tracks from northeast to southwest. Immediately

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west of this road, and south of the south side track, the plaintiff's intestate, Charles J. Miller, had a lumber yard, and occupied therewith about 250 feet of ground along the side track. He had carried on business there for several years. It does not appear how the remaining land along the south side track was occupied, except there was a coal-shed south of it, directly east of such traveled road, but by whom it was used does not appear. Neither does it appear how, or for what purposes, or by whom, such south track was ordinarily used, except it was used for the purposes of the lumber business of the deceased.

May 7, 1884, a car loaded with lumber belonging to the deceased was detached from a freight train and left on the south side track at a point some twenty or thirty feet west of the road crossing before mentioned, to be unloaded. The deceased directed where it should be left. The lumber was piled on this car four or five feet high. We infer that it was an open or platform car and was left there during the forenoon or early in the afternoon, although there is no direct testimony on these subjects. Afterwards, on the same day, a man named Winnefeld met the deceased at the coal-house above mentioned, and they had a conversation about the car-load of lumber. Winnefeld thought it was all fence lumber, and doubted whether there would be much demand for it. The deceased said that it contained other kinds of lumber, and they walked over to the car (which was four or five rods from them) and examined the lumber. They went round the car and stopped at the east end of it between the rails of the track, close to the car and facing it, where they continued their conversation about the fence lumber. While thus engaged, the lumber car was suddenly struck from the west with sufficient force to move it east on the track to the coal-shed, and it threw Miller over backwards, ran over him, and so injured him that he died during the same afternoon. It appears that

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two or three flat cars were standing upon the same track (but at what distance from the lumber car does not appear), and that they ran down the track east, the foremost one striking the lumber car and thus causing the death of Miller.

The only witness on the trial who gave testimony of any importance as to the cause of the death of Miller was this man Winnefeld. His testimony gives us no information on many points bearing directly on the merits of the case, which it would seem might easily have been supplied by him or other witnesses. The accident happened in the daytime, on the depot grounds of an important station, being at the junction of two lines of railway and in a considerable village, and it seems incredible that testimony of all the material circumstances connected with the disaster could not readily have been obtained. Yet the testimony does not inform us what force set the flat cars in motion, which was the primary cause of Miller's death, nor how long those cars had stood upon the track. There is no testimony showing, or tending to show, that any engine had been upon the track during that day, or had thrown cars upon it from the main track, thus driving the flat cars upon the lumber car. Indeed, the testimony of Winnefeld tends rather to show that nothing of the kind occurred. Neither is there any testimony that any employee of the defendant company was about that south side track, or doing anything on or about it, when the accident happened or before. On the contrary, Winnefeld testifies that he saw no one there. Neither are we informed of the grade of the track, which may be important in determining the force with which the lumber car was struck. It has already been said that there is no testimony of the customary manner in which the south side track had been theretofore used. These might be important elements in determining the question of negligence, whether of the deceased or of the railway company.

Winnefeld testifies, however, that, by reason of an en-

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gine on another track blowing off steam, he could not have heard any signal of approaching cars, had one been given before the lumber car was struck; and, further, that when the deceased stepped behind the car he did not look to the other end. Of course, had he done so, he would have seen the cars moving towards him on the track, had they been in motion when he took up his perilous position.

It will be observed that the testimony leaves us almost entirely in the dark as to the proximate cause of the death of Miller. It informs us that a force was applied to the flat cars, which resulted in moving the lumber car upon him, causing his death. That is substantially all the direct evidence we have on the subject.

It is maintained, on behalf of the plaintiff, that this testimony, viewed in the light of the surrounding circumstances, raised a sufficient presumption that the death of Miller was caused by the negligence of the defendant company to send the question of such negligence to the jury. The basis of this proposition is the rule laid down in *Scott v. London & St. K. Docks Co.* 3 Hurl. & C. 596, and adopted by this court in *Cummings v. Nat. Furnace Co.* 60 Wis. 603, and other cases. The rule is thus stated: "In an action for personal injury caused by the alleged negligence of the defendant, the plaintiff must adduce reasonable evidence of negligence to warrant the judge in leaving the case to the jury; but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

Under this rule it is claimed that from the facts proved, as above stated, the court must presume (1) that the defendant threw cars upon the side track, which moved the cars standing thereon and thus caused the death of Miller;

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and (2) that it did so negligently. We think the rule admits of no such application. In the first place, no case should be determined upon a mere presumption of fact when direct and positive evidence of the fact can readily be obtained. In this case, if cars were thrown or pushed upon the side track several men were engaged in the act, and the plaintiff might easily have ascertained who they were. Besides, in all reasonable probability, other persons, readily ascertainable, saw the act; and the sad result of it would have impressed what they saw upon their minds. Again, the tendency of the testimony is against the inference that the defendant's employees threw cars upon the track, or used it at all, after the lumber car was placed upon it. The inference that they did so must rest entirely upon the assumption that there was no other adequate power existing there to produce the result. How can we know this from the meager and unsatisfactory evidence in the case? It is quite manifest that the brakes were not set on any of the cars standing on the side track; and, if the grade is a little descending to the east, it is just as reasonable to presume that the flat cars were started by some other agency, and gained sufficient momentum on such descending grade to move the lumber car a few rods. We do not think any such presumption can properly be indulged in; but it is just as reasonable as the presumptions contended for by the plaintiff, upon which her right of action depends.

But were we to presume that the cars were put in motion by the employees of the company, as claimed, the further presumption of negligence on their part would not necessarily follow. There is nothing in the evidence to support it,—no proof of any fact which raises the inference of negligence on their part. The defendant had a right to use that side track in the course of its business; and if, in so using such track, it was necessary or convenient to move

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the lumber car, the company might lawfully do so, returning it to its designated place within a reasonable time thereafter. There is nothing in the testimony tending to show that the cars were thrown upon the track with more force than was necessary to accomplish the intended purpose of placing them there. The fact that the cars standing upon the track were thereby moved a short distance does not tend to show negligence. Neither is there any foundation in the proofs for the inference that there was any failure in the use of all necessary precautions to avoid accident. A sentinel on the flat cars could not have known that the deceased was standing behind and facing the lumber car, entirely hidden from view; nor could he have been seen by a person standing at the side of the track and looking down it from the west. There is also an entire absence of testimony as to whether signals were given from the train which we are now presuming, without proof, was being operated on the side track.

We conclude, therefore, that this is not a case in which "the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care;" and hence that there is no presumption that the defendant's employees were negligent. There is no proof that such employees were managing and using the side track and cars thereon when Miller was killed; and, if they were, there is no proof that they managed or used the same negligently. The accident, under the circumstances proved, was entirely consistent with the exercise by them of reasonable and proper care. There being no testimony in the case tending to show negligence on the part of the defendant or its employees, the court properly nonsuited the plaintiff.

We also incline to the opinion that negligence by the deceased, contributing directly to his death, was conclusively

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proved, and that the nonsuit may be upheld on that ground. It is not necessary, however, to discuss or definitely determine this proposition.

By the Court.—The judgment of the county court is affirmed.

THE TOWN OF SAUKVILLE, Respondent, vs. THE TOWN OF GRAFTON, Appellant.

January 14 — February 1, 1887.

(1) Appeal to S. C.: Exceptions to finding of facts. (2) Paupers: Legal settlement.

1. Unless the findings of fact are excepted to in writing and such exceptions are inserted in the bill of exceptions, the sufficiency of the evidence to sustain the findings cannot be inquired into on an appeal from the judgment. So *held* in a case where the findings were announced orally and the appellant had no knowledge that written findings had been made and filed until the bill of exceptions was made up, and no notice of the entry of judgment had been served on him.
2. A pauper about sixty years old, having a legal settlement in the town of G., was supported for ten years at the expense of that town in the poor-house of the town of S. Afterwards one D. was employed by the town of G. to support him for about six months at $1 per week, and thereafter for four years he lived with D. in the town of S. and worked for his board and clothes. D. then refused to support him, and he applied again to the town of G. for support, which was refused, and he was then supported by the town of S. *Held*, that he was a pauper all of the time mentioned, and therefore did not acquire a legal settlement in the town of S., and the town of G. remained liable for his support.

APPEAL from the Circuit Court for *Ozaukee* County.

The facts are sufficiently stated in the opinion.

The cause was submitted for the appellant on the brief of *E. S. Turner*, and for the respondent on that of *Hedding & Jackson*.

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TAYLOR, J. This was an action to compel the town of *Grafton* to pay the town of *Saukville* the sum of $45, which said town of *Saukville* had expended in the support and maintenance of one Christian Ebert, a pauper, who, the town of *Saukville* charges, had a legal settlement in said town of *Grafton*, and that such town was consequently liable to the town of *Saukville* for his support. There is no question made as to the regularity of the proceedings on the part of the town of *Saukville* to charge the town of *Grafton* with the support furnished to the said Christian Ebert if he had a legal settlement in said town. And both parties admit that said Ebert is now and was a pauper at the time such support was furnished, and that he required the support given to him by said town of *Saukville*. The defense of the town of *Grafton* is that said Ebert had no legal settlement in said town of *Grafton* when such support was furnished to him, and that his legal settlement was in the town of *Saukville*.

The case was tried in the circuit court without a jury. After hearing the evidence, the court made and filed findings of fact and conclusions of law, and upon such findings judgment was entered in favor of the respondent, and against the defendant, the town of *Grafton*. The record does not show that any exceptions were taken by the appellant either to the findings of fact or conclusions of law. In that state of the record the only question for this court to consider is whether the judgment is supported by the findings. The conclusions of law are that the said Ebert had, prior to 1872, a legal settlement, and has continued to have such settlement up to the commencement of this action, in the said town of *Grafton*, and from the 1st of January, 1872, up to the commencement of this action, said Ebert has continuously been a pauper; these two facts being the only ones contested on the trial. All others being conceded,

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the town of *Saukville* was entitled to the judgment as ordered by the court.

It is a well-settled rule of this court that when the findings of fact are not excepted to, the sufficiency of the evidence to sustain such findings cannot be inquired into on appeal from the judgment. See the following cases cited by the learned counsel for the respondent: *Cramer v. Hanaford*, 53 Wis. 85; *Wis. R. Imp. Co. v. Lyons*, 30 Wis. 61; *Thomas v. Mitchell*, 27 Wis. 414; *Mead v. Sup'rs Chippewa Co.* 41 Wis. 205. The learned counsel for the appellant states in his brief that the court announced his findings orally, and that he had no knowledge that any written findings of fact and conclusions of law were made and filed until the bill of exceptions was made up, and that no written notice of the judgment entered was served on him as required by sec. 2870. This is, however, no excuse for not taking written exceptions to the findings when they were produced and inserted in the bill of exceptions. As no notice of judgment had been served, the appellant would have been in time to file his written exceptions when the findings were produced and required to be inserted in the bill of exceptions. The exceptions to the findings must not only be in writing, but they must be inserted in the bill of exceptions. *Cramer v. Hanaford, supra.* See sec. 2875, R. S.

The findings of fact clearly sustain the judgment entered in the case. But, if we look into the evidence, it seems clear to us that the learned circuit judge was correct in his findings. The material question in the case was whether Mr. Ebert had a legal settlement in the town of *Grafton.* If he had, then that town is chargeable with his support. Now, the evidence is conclusive that before January 1, 1872, Ebert had a legal settlement in said town; that on or about that day he became a pauper, requiring support; that the town of *Grafton* placed him in the poor-house in the town of *Saukville*, where he was supported by the town of *Grafton*

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until some time in the year 1881; that said Ebert, when he became a pauper, was about sixty years old; that when he left the poor-house, where he had been supported by the said town of *Grafton* for about nine and a half years, he was nearly seventy years old; that that town employed a Mr. Dengel to support him for about six months at a dollar per week, and thereafter and for four years he lived with Mr. Dengel, and worked for his board and clothes, in said town of *Saukville*. Thereafter Mr. Dengel refused to support him, and he again called upon the town of *Grafton* for support, which was refused, and the town of *Saukville* gave him support, and for such support this action is brought.

Having acquired a legal settlement in the town of *Grafton*, that town is liable for his support unless Mr. Ebert had thereafter acquired a legal settlement in some other town. His residence in the town of *Saukville* while he was supported therein as a pauper did not give him a legal settlement in such town. See *Scott v. Clayton*, 51 Wis. 185; 54 Wis. 499. There is no pretense that his residence in said town of *Saukville* from 1872 down to the fall of 1881 gave him any settlement in such town; and we think the court is right in holding that his residence after that date in said town, where he was supported by Mr. Dengel, did not give him a legal settlement therein. He was a pauper all the time, dependent on the charity of Mr. Dengel and not on his ability to support himself by his own labor. This is apparent from the fact that, as soon as Mr. Dengel withdrew his support, he at once became a public charge again. This man who for ten years, from the age of sixty to seventy years, had been a public pauper, unable to procure himself a support by his personal exertions, would not be likely to better his condition or improve his capacity for self-support after the age of seventy years.

Webster defines the word "pauper" to mean "a poor person; especially one so indigent as to depend on charity

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for maintenance; or one supported by some public provision." Mr. Ebert was a pauper, according to the last definition of Webster, from January 1, 1872, to about October 1, 1881, and a pauper from that date, according to the first definition, until he again became a pauper by being supported by a public provision in October, 1885.

On the merits we think the case was properly decided.

By the Court.— The judgment of the circuit court is affirmed.

BAUM and others, Respondents, vs. BOSWORTH and others, Garnishees, etc., Appellants.

January 14 — February 1, 1887.

(1) Debtor and creditor: Fraudulent conveyance: Chattel mortgage. (2) Evidence of value: Reversal of judgment.

1. The evidence in this case shows, among other things, that a wholesale mercantile firm, to secure a debt due from an insolvent retail dealer, took a mortgage of his entire stock in trade and fixtures (being everything he had not exempt from execution) worth nearly three times the amount of the debt; that nominally the mortgagees took possession and placed the debtor's brother in charge of the goods, but in fact the debtor attended to the business much as before, making sales as usual and taking goods from the stock for his own consumption, the mortgagees furnishing more goods to keep up the stock; that the mortgagees never asked or received an accounting of the goods sold from the mortgaged stock; that after about three months, the other creditors becoming pressing, the mortgagees had the property sold at auction on one day's notice, bidding it in themselves, and again placed the debtor in charge of the business; that the goods mortgaged were never inventoried; that since the auction sale a large part of the debt to the mortgagees has been paid, but there has never been a full settlement showing what goods have been sold or what the balance due is. *Held*, that the mortgage was void, as having been given with intent to hinder and delay other creditors.

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2. A witness was allowed to testify to his opinion of the value of a stock of goods, after he had stated that he made no particular examination of them. He was fully cross-examined and gave the reasons for his opinion. The goods had never been invoiced, and none of the other witnesses on either side knew much, if anything, more about the goods. *Held*, that the testimony could not have misled the jury or prejudiced the appellants.

APPEAL from the Circuit Court for *Door* County.

The facts are sufficiently stated in the opinion.

The cause was submitted for the appellants on briefs by *Winfield Smith*, and for the respondents on the brief of *Turner & Timlin*.

To the point that the transaction in question was fraudulent and the chattel mortgage void, counsel for the respondents cited *Anderson v. Patterson*, 64 Wis. 557; *Smith v. Welch*, 10 id. 91; *Grant v. Lewis*, 14 id. 487; Wait on Fraud. Conv. 198, 257.

ORTON, J. There was an execution for $408.78, in favor of the respondents and against one William Voight, in the hands of the sheriff unsatisfied, and appellants were summoned as garnishees, and answered that they had no money or other property in their hands belonging to said execution defendant, and that they were not indebted to him in any sum whatever. The respondents formed an issue on said answer, and the case was tried by a jury, and a verdict was rendered for the respondents, against said appellants as such garnishees, for the sum of $429, and judgment entered thereon, from which this appeal is taken.

The only exception taken to the ruling of the court was to allowing the witness Scott, the sheriff having said execution in his hands, to testify to his opinion of the value of the stock of goods, after he had stated that he made no particular examination of them. He was very fully cross-examined as to his knowledge, and gave the reasons for his

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opinion, and the stock was never invoiced, and all the other witnesses on both sides had very little, if any, more knowledge of the particulars of the stock than he had, and such was the only evidence of its value in the case. We do not think that the jury could have been misled, or the appellants prejudiced, by his evidence.

The main ground of attack upon the judgment is that the verdict was contrary to the evidence. The defendant William Voight was a merchant at Sister Bay, in Door county, and had purchased goods of the appellants, as the firm of *Bosworth & Sons*, of the city of Milwaukee, to the amount of $862.60. On the 6th day of August, 1884, this indebtedness was put in the form of three notes, of $200, $300, and $362.60, payable in sixty days and in three months, at nine per cent. interest, and a mortgage was executed by the said Voight to the appellants on his said stock of goods at Sister Bay to secure the same, and about the 30th day of October said stock was taken by the said appellants on said mortgage and sold at public auction, to themselves, for $600. The respondents predicated their claim against the appellants on the ground that said mortgage was void as to creditors because made and taken to hinder, delay, or defraud the creditors of said William Voight, and this was the issue tried by the jury, upon which the verdict was found against the appellants.

From an examination of the evidence, we are satisfied that there was sufficient evidence to warrant the jury in finding that said mortgage was made at least to *hinder* or *delay* other creditors of Voight, of their lawful actions, damages, forfeitures, debts, or demands, and that was sufficient to avoid it as to the respondents. We certainly cannot find any clear preponderance of the evidence against the verdict. One Gotlieb Voight, the brother of William, owned the store, and had purchased quite a large quantity of goods from the appellants, and settled up his accounts

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with them previous to March, 1883, and turned over to William at that time the stock that was left and the business, and the appellants commenced selling William goods on credit, and changed the heading of their books by writing "W." in the place of "G." William had very little, if any, ready means, and he continued to make purchases of them and of other merchants on credit, and to make sales, and did a very fair business for a country merchant, until said mortgage was placed upon his entire stock in trade and the fixtures of his store, in August, 1884. He had no other property not exempt from execution, and he had become indebted in large sums to other creditors, which he was unable to pay, many of which went into judgments soon after said mortgage was given, and executions thereon were returned unsatisfied and no property found. He was grossly insolvent when said mortgage was given. Can it be possible that none of the appellants made any inquiry into his circumstances, and did not know that he was greatly in debt and insolvent? They did not all testify in the case, and we cannot but think that, as good business men as they undoubtedly were, they had sufficient knowledge of William's circumstances to make them anxious, at least, to obtain security for their claim. They took a mortgage upon everything he had liable to execution, and all the other creditors were held off. The value of the property mortgaged was nearly three times the amount of their debt. When the mortgage was given they sent an agent to Sister Bay, and he, *ex industria*, went through the form of taking possession of the stock and store, and ostensibly placed Gotlieb Voight, who lived at Hedge-hog Harbor, about ten miles distant, and engaged in other business there, in possession of the same for the purpose of continuing the business, and before the 30th day of October, when said goods were sold at auction, or the balance of them, sales were continued to be made out of the stock in the

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same way as formerly, and the appellants furnished the concern more goods to keep up the stock, and none of said sales for nearly three months were ever accounted for in any way, and the appellants received only sufficient during this time to pay for the new goods so furnished, and they have never asked for an accounting for the sales so made out of the mortgaged stock, and they do not yet know the amount thereof. Gotlieb did not personally attend to the business, and only occasionally visited the store. It seems, according to the testimony of William, that Gotlieb appointed a little girl, their niece, who lived with and worked for William in a room adjacent to and connected with said store, as his agent to sell goods and to take general charge of the business, and she did so when William was absent, but when he was present he made sales and attended to the business as usual. He lived with this little girl and kept house in the same building as the store, and was a single man, and he took tea, coffee, sugar, and tobacco and other goods from the stock to live on in the mean time.

In this way the business was so conducted, and to those who visited the store William appeared to be doing business as usual, until executions began to press upon him and other creditors became clamorous for their pay, when, about the 30th day of October, the same agent of the appellants appeared again at Sister Bay, and again took possession of the remnant of the stock, and on one day's notice had it sold, and bid it off for the appellants for $600, there being no other bidder present. There never was, from first to last, any inventory made to determine what was mortgaged or sold. As soon as sold, William was again placed in possession of the store and stock, and continued to do business and sell therefrom as before, but ostensibly as the agent of the appellants, and there has been paid, in cord-wood received for goods since that time, about $700 on the notes given, and William has considerable cord-wood yet on hand, and, so far as appears

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from the case, the business at the store has continued very much as formerly, only it is supposed the stock mortgaged has all been sold out. There has never been a full and final settlement between the appellants and William, in order to ascertain what real balance of the debt remained unpaid or what goods had been sold and for what. The agent testified that "he did not know what goods were left with William, and he would have to trust his honesty for that." When, by the evidence for the plaintiff, it appeared that the stock mortgaged was worth at least $2,000, William Voight testified on behalf of the defendant that his brother Gotlieb owned at least half of it, when he had already testified that he owned the stock and mortgaged the whole of it. His testimony was not very clear or reliable, on account of its frequent contradictions. The mortgage was upon the whole stock in bulk, without specification, and so the sale was made of what there was left of it.

Do not these facts show an intent on the part of the appellants to so take the mortgage and proceed under it as to enable William Voight to continue on in his business as a merchant and to live on its profits, and hold off other creditors, and finally trust to William's integrity in managing it to some time get their debt discharged? This mortgage and the proceedings under its protection have certainly had the effect to enable William to continue his business for the sole benefit of himself and the appellants, and to hinder and delay the other creditors. If such be the legitimate effect, it must be presumed that such was the design. Who knows or can know that the sales during the three months between the giving of the mortgage and the public sale were not sufficient to have paid the appellants' claim? There was no account of these sales ever kept or rendered or asked for, and all the time the appellants were ostensibly conducting the business through their agent, Gotlieb Voight. Was this fair, or a fraud on creditors? It would seem that

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the appellants had unreasonably, unnecessarily, and indulgently delayed, through this pretext or contrivance, the collection of their own claim, for the purpose of hindering and delaying other creditors. Mr. Justice LYON said in *Anderson v. Patterson*, 64 Wis. 557: "The conclusive inference from these facts is that there was an implied agreement or understanding between the parties, when the mortgage was executed, that the mortgagor might deal with the property as he did. Were such not the understanding, it is incredible that the mortgagee would have stood quietly by, and witnessed the misappropriation of the property and the consequent destruction of his security, without remonstrance or objection." The appellants not only did all this, but furnished the mortgagor, from time to time, more goods to continue the business with. If this transaction can be supported, then there can scarcely occur a case where the parties designed and intended to hinder or delay other creditors, for the circumstances leading to such a conclusion are most unusually strong and conclusive. See cases cited in respondents' brief.

By the Court.—The judgment of the circuit court is affirmed.

MURPHY, Respondent, vs. HALL, Appellant.

January 15 — February 1, 1887.

Tax sales: Description of land: Certainty: Constitutional law: Special legislation.

1. Ch. 105, Laws of 1881, provides that each parcel of land in the city of Oconto subject to taxation shall be fully described in numerical order in a book called the assessor's book, and shall also be known and designated in such book by numbers, thus: Part ——, of lot ——, of section ——, etc.; that such book shall be *written up an-*

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nually by adding thereto or *changing* all descriptions of parcels of land which have, by subdivision or otherwise, become liable to taxation since the book was last written up; that a map corresponding to such book shall be kept as a public record in the office of register of deeds, and shall also be written up and corrected annually; that in all the assessment and tax rolls, and in all advertisements, certificates, papers, conveyances, or proceedings for the assessment and collection of taxes, and proceedings founded thereon, any description by number shall be held to include the description written at length in the assessor's book, and any conveyance describing real estate by such number shall be legal and binding in all respects as if described by metes and bounds. Notwithstanding such act it is *held* that a description in tax certificates of land in the city of Oconto, as "Part 5 of lot 4 of section 20, town 28 north, of range 22 east," without referring to said act or to any book or map made in pursuance thereof, or to any other record, plat, or description, is so indefinite and uncertain as to be fatally defective.

[2. Whether said ch. 105, Laws of 1881, is void as contravening secs. 31, 32, art. IV, of the constitution, not determined.]

APPEAL from the Circuit Court for *Oconto* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an appeal from an order overruling a demurrer to the complaint for insufficiency, in an action to foreclose three several tax certificates purporting to be issued on three several sales of the same land, each to Oconto county, by the county treasurer thereof, at the dates, respectively, May 16, 1882, May 15, 1883, and May 20, 1884, and each purporting to be for the nonpayment of the taxes, interest, and charges due on said land for the year previous to such sales respectively. The only description of such land in either of said certificates is as follows, to wit: "Part 5 of lot 4 of section 20, town 28 north, of range 22 east."

The complaint alleges that the land so described was "situate, lying, and being in the city and county of Oconto, Wisconsin;" and also that the land so sold as aforesaid is that part of lot 4 of section 20 of township 28 N., of range

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22 E., described by metes and bounds as follows, viz.: "Commencing at northeast corner of highway and Jones street; running thence north, along Jones street, 177 feet and 4 inches; thence east 137 feet and 4 inches; thence south 163 feet and 2 inches; thence westerly along the line of highway to place of beginning;" but the same was assessed for taxes, and returned, advertised, and sold, as part 5 of lot 4 of said section 20, and was described in said certificate as aforesaid, in virtue of the provisions of ch. 105, Laws of 1881, that being the manner and form in which said piece of land above described by metes and bounds is referred to and described in the assessor's book of the city of Oconto, in said act provided for, all the provisions of which ch. 105 above referred to, providing for the making and keeping of a book to be known and designated as the "Assessor's Book of the City of Oconto," and of a map of the city of Oconto, and a duplicate copy thereof, having been complied with; and such a book and maps having been made and kept as required by the terms of said act, prior to the making of the tax assessment for the taxes of 1881 of the real estate subject to taxation in said city for said year. The complaint also alleges that the plaintiff purchased and became the owner and assignee of said certificates, and still was such owner; that no part of said taxes for either of said years had been paid, and no part of said land had been redeemed therefrom, but that the amount for which the land was so sold in each of said years, with interest thereon at twenty-five per cent. per annum from the dates of said sales respectively, was due and payable; that the defendant was the owner and in possession of the land. The complaint also contained the usual prayer for relief in such cases.

For the appellant there was a brief by *Fairchild & Fairchild*, and oral argument by *Mr. H. O. Fairchild.*

For the respondent there was a brief by *Webster & Wheeler*, and oral argument by *Mr. Webster.*

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CASSODAY, J. It is urged that the description of the land in each certificate is so indefinite and uncertain as to be fatally defective. This is virtually conceded to be true, unless the description is aided by the "Act to regulate the description of real estate for the purposes of assessment and taxation in the city of Oconto." Ch. 105, Laws of 1881. By that act all the real estate in the city subject to taxation was required to be correctly and fully described, in numerical order, in a book to be kept for that purpose in the office of the register of deeds, to be known and designated as the "Assessor's Book of the City of Oconto" (sec. 1); and to "be a part of the public records of Oconto county and city, of the same legal force with other public records of real estate, to effect the purposes of this act" (sec. 2). The city council was required by the act to cause such book *to be written up annually* by *adding thereto or changing all descriptions of* lots or parcels of real estate which should, by subdivision or otherwise, become liable to taxation subsequently to the times, respectively, when such book should be *last* so written up. Sec. 3. Each and every parcel of real estate in the city liable to taxation, and which had been conveyed by metes and bounds prior to the time when such book should be so written up, was thereby required to be described therein, as nearly as might be, in the words of the deed by which it had been conveyed of record; and any lot which had not been so conveyed by deed when such book should be so written up, or which was not then numbered upon a recorded plat, was thereby required to be described in such book by a correct and pertinent description, to be obtained if necessary by the employment of a competent surveyor; and no description was to be deemed insufficient by reason of the use of abbreviations or figures or signs commonly used in describing land. Sec. 4. Each and every lot and parcel of land described in such book, as provided in section 4 of the act, was also required to be known and designated

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in said book by numbers, thus: "Part [1 or other number], of lot —— [or other government subdivision], of section ——, township ——, range ——;" or "part [number], of lot ——, block ——, in ——'s addition to the city [or village] of Oconto." Sec. 5. In all the assessment and tax rolls, and in all advertisements, certificates, papers, conveyances, or proceedings for the assessment and collection of taxes, and proceedings founded thereon, any such "description by number" was thereby declared to "be sufficient," and to "be held to include and be a part of the description of the same lot or parcel of land written at length upon" such book. Sec. 6. A map of the city of Oconto was thereby required to be kept in the office of the city clerk, and a duplicate thereof in the office of the register of deeds, upon which every lot or parcel of land in said city was thereby required to "be correctly drawn and designated," and which duplicate maps were thereby required to "be written up and corrected *annually*, so as to correspond with" such newly written up and corrected book; and the same were thereby declared to "be a public record, in connection with, and as a part of, the records of assessment and taxation in said city." Sec. 7. Any conveyance or instrument in writing, by which any estate or interest in real estate in the city of Oconto is created, aliened, mortgaged, or assigned, or by which the title to any real estate in said city may be affected, in law or equity, describing such real estate or interest therein by numbers as therein provided, is thereby declared to "be legal and binding in all respects as if described by metes and bounds." Sec. 8.

In discussing the question of an alleged indefinite and uncertain description of land in a tax deed, it was said in *Meade v. Gilfoyle*, 64 Wis. 18, that "the ambiguity in the description here consists in reference to records, documents, and descriptions outside the deeds, and which were necessarily to be regarded as a part of the description. This was

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a latent ambiguity." And then, in view of the statute declaring that "in all advertisements, certificates, papers, or proceedings relating to . . . the assessment and collection of taxes and proceedings founded thereon, . . . any description of lands which shall indicate the land intended with ordinary and reasonable certainty, and which would be sufficient between grantor and grantee in an ordinary conveyance, shall be sufficient" (R. S. sec. 1047; Laws of 1881, ch. 268), it was, in effect, held that extrinsic evidence was "admissible in the case of *such tax deeds*, the same as it would be in the case of an ordinary conveyance between grantor and grantee." That case was there distinguished from those where the lots, blocks, and addition appeared to be perfectly described on the face of the tax deed, but the recorded plat revealed the fact that there were no such lots and blocks in the addition named, although there were such lots and blocks in a different addition; and also from that other class, where there was no complete description given in the deed, nor any reference therein to any other record, document, plat, or description capable of being proved by extrinsic evidence, and thus making certain what would otherwise have been uncertain; as in *Johnson v. Ashland Lumber Co.* 52 Wis. 458; *Campbell v. Packard*, 61 Wis. 88.

Here neither of the certificates contain any complete description of any land, nor is there any reference in either of them to ch. 105, Laws of 1881, or any assessor's book or map made in pursuance thereof, or any other record, document, plat, map, or description whatever. The contention of the learned counsel for the plaintiff is to the effect that, as the assessor's book is required by the act to have a complete description of each and every parcel or lot of land (sec. 4), and that each and every lot or parcel of land so described should "also be known and designated in said book by numbers" (sec. 5), as indicated, and then that "any description by number" as aforesaid should "be sufficient"

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and "held to include and be a part of the description of the same lot or parcel of land *written at length upon the assessor's book*" (sec. 6), such book and its corresponding map must be regarded as a part of each certificate, and that, so regarded, the description in each would be complete, definite, and certain.

It was not held in *Delorme v. Ferk*, 24 Wis. 201, nor *Meade v. Gilfoyle*, *supra*, that a statute might supply an entire want of description; but merely that any description in a tax deed which indicated the land intended with ordinary and reasonable certainty, and which would be sufficient between grantor and grantee in an ordinary conveyance, would be sufficient. This is on the theory that the law will not declare a description void for uncertainty when the light which contemporaneous facts and circumstances furnish renders it definite and certain. *Docter v. Hellberg*, 65 Wis. 421. "It is undoubtedly essential to the validity of a grant," said MARSHALL, C. J., "that there should be a thing granted, which must be so described as to be capable of being distinguished from other things of the same kind. But it is not necessary that the grant itself should contain such a description as, without the aid of extrinsic testimony, to ascertain precisely what is conveyed. Almost all grants of land call for natural objects, which must be proved by testimony consistent with the grant, but not found in it." *Blake v. Doherty*, 5 Wheat. 362.

Undoubtedly a tax deed or a tax certificate must be construed with reference to existing statutes. In other words, statutes may be enacted for the purpose of aiding descriptions in tax proceedings. But it does not necessarily follow that such statutes may entirely dispense with all description, or subject the same to an annual change by a city council or its selected agencies, in conformity with a fictitious standard or model devised to satisfy the convenience or caprice of some official or agent. The contention is, in

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effect, that by the act in question the legislature did devise such fictitious standard or model, by way of giving to the initiated special significance to arbitrary "parts" or "numbers," to be placed in "numerical order," and each and every lot or parcel of land in the city to be known and designated simply by such number or part, as stated. One of the most vicious features of such fictitious standard or model is the annual change or readjustment thereof, as made necessary by the assessor's book and the corresponding map being written up and corrected annually by adding thereto and changing and correcting descriptions therein. By virtue of such annual change or readjustment of such fictitious standard or model, and upon the assumption that the number by which the land is to be designated in each tax certificate, certificate of redemption, and tax deed is the one last applied to any particular piece of land, it is easy to conceive how a lot or parcel of land might be designated in the assessment or tax roll by one number, and the next year the same land, or some part of it, in the advertisement and certificate of sale by an entirely different number, and then, perhaps a year or so afterwards, in a certificate of redemption by a still different number, and finally in a tax deed by a still different number. But if such assumption is unfounded, and the designation in each advertisement, certificate, paper, conveyance, or proceeding for the assessment or collection of taxes (sec. 6) is to be the same number mentioned in the assessment and tax roll upon which it is founded, then the confusion might still be great; for, in case of delinquencies in the payment of taxes for several successive years, there might be a corresponding multiplicity of numbers, with each separate number used to designate the same land in a variety of papers. This would render a designation by a mere number without significance. True, each of the certificates of sale in question states the particular year for which the taxes were due and

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unpaid. But neither states the precise time, nor even the year, when such fictitious designation therein employed became fixed. We may assume, for the purposes of this case, the possibility or even the probability of ascertaining with certainty the land supposed to be represented by such fictitious designation, by the aid of an expert in such matters. The same would be true of a correct description in a foreign language. But, even upon such assumption, is not such fictitious designation well calculated to deceive and mislead the unlearned, the unwary, and in fact almost everybody owning land in the city, except those whose business or interest has induced a thorough familiarity with such matters?

But all the land in the city may not be owned by residents of the city. Presumably it is not. A nonresident of any city or the state may own land in a dozen cities and other parts of the state. If Oconto can have an independent, fictitious designation, then each of the other cities may devise an entirely different fictitious standard, thus making the confusion of such land-owner worse confounded. Of course, the purpose of taxation is revenue. This should be secured, however, without subjecting the owners of property to unnecessary burdens. Before the title to land should be divested by tax proceedings, the owner should have a full and fair opportunity for hearing, payment, and redemption. In such proceedings, the land should be described with sufficient particularity to afford the owners and others interested the means of identification without misleading them. Cooley on Taxation, 404 *et seq.* One of the objects of tax proceedings, and especially notices, posters, advertisements, etc., is to give owners and all others interested an opportunity of being heard and due notice that the title is to be ultimately divested unless the tax is paid or the land redeemed. Hence it has often been held that such tax proceedings, taken together, are in effect "due process

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of law," within the meaning of the constitution. Sec. 1, art. XIV, Amendments, Const. U. S.; *Baldwin v. Ely*, 66 Wis. 188–191, and cases there cited. But to hold that every owner of real estate in the city is bound, not only to know the provisions of the act in question and the first fictitious designation of every part of his land or any subdivision thereof under it, but also each and every annual change and readjustment of the same without any reference thereto in any such assessment, tax roll, advertisement, certificate, paper, conveyance, or proceeding for the assessment and collection of taxes against the same, is to hold that he has constructive notice of what, to the great mass of people, is concealed information, and that there may be due process of law in divesting title to land by such tax proceedings without any practical or known opportunity for a hearing, payment, or redemption. This would be worse than no attempt at notice, for it misleads and deceives. Some of the mischiefs of such an act, under such a construction, may be imagined, when we consider that if the owner should be so bound all subsequent purchasers of the land would be equally bound. The result would be that each and every such purchaser would not only be compelled to ascertain whether his grantor had a clear title to the land as described in his deed, but also whether there was or had been any tax deed or tax incumbrance by any and every such fictitious designation which had ever been so applied to such land. Such a holding would, in a limited sense, frustrate one of the objects of the recording acts, which is to protect *bona fide* purchasers for value. It would be in its effect, to some extent, similar to the change of public records of title by authority of law. Thus, in addition to the uncertainty and indefiniteness of such fictitious designation, we find that correct descriptions in conveyances are thereby rendered unreliable. Certainly, no strained liberality of construction should be resorted to in order to perpetuate

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an act so fraught with public mischief and private wrong. We must hold that the description in each of the tax certificates in question is too indefinite and uncertain to give any substantial information to the land-owner or others interested. The same was presumptively true respecting the description in the advertisement upon which the sale was made and the certificate issued.

The view we have taken of the case renders it unnecessary to determine whether ch. 105, Laws of 1881, is in contravention of the amendment to art. IV of the constitution of the state, which, among other things, provides:

"Sec. 31. The legislature is prohibited from enacting any special or private laws . . . (6) for assessment or collection of taxes, or for extending the time for the collection thereof; (7) for granting corporate powers or privileges, *except to cities*. . . .

"Sec. 32. The legislature shall provide general laws for the transaction of *any* business that may be prohibited by section thirty-one of this article, and *all* such laws *shall be uniform in their operation throughout* the state."

The gravity of such a question suggests the propriety of reserving its determination until imperative duty requires.

By the Court.—The order of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

O'REILLY, Appellant, vs. MILWAUKEE & NORTHERN RAILROAD COMPANY, Garnishee, etc., Respondent.

January 15 — February 1, 1887.

Liens: Action, legal or equitable? Garnishment.

An action to enforce a laborer's lien on cord-wood, under ch. 143, R. S., as amended, is legal in its nature, and garnishment may be resorted to in aid thereof.

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APPEAL from the Circuit Court for *Oconto* County.

The facts will sufficiently appear from the opinion.

For the appellant there was a brief by *Webster & Wheeler*, and oral argument by *Mr. Webster*.

George H. Noyes, for the respondent.

COLE, C. J. This action was commenced by summons to enforce a laborer's lien upon cord-wood. Garnishee proceedings were subsequently instituted, and the respondent company summoned as garnishee. The garnishee answered, denying all liability to the defendant in the main action. The plaintiff took issue on the answer of the garnishee. Upon this issue coming on for trial, the garnishee proceeding was dismissed on motion. The appeal is from the order dismissing the proceeding.

As we understand the contention of respondent's counsel, it is that the order is correct, (1) because an action to enforce a laborer's lien upon cord-wood is essentially equitable in its nature, and that the right of garnishment is not given in suits in equity; and (2) the proceeding to enforce such lien is a special one, given and regulated entirely by the statute, and the garnishee process has not been made applicable to it.

Whether the proceeding to enforce the lien is legal or equitable depends wholly upon the provisions of the statute. It is competent for the legislature to give such a remedy in a legal action, and in the particular case we can only determine from the statute itself whether the proceeding partakes of a legal or equitable character. An action to enforce a mechanic's lien under the Revision of 1878 has been held to be equitable mainly because the procedure to enforce it was very similar to a suit to foreclose a mortgage, and provision was made for an equitable distribution of the proceeds of the sale among the several lien claimants (*Willer v. Bergenthal*, 50 Wis. 474), although under the old statute

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it had been decided that the action was one at law. *Marsh v. Fraser*, 27 Wis. 596.

An examination of the provisions of ch. 143, R. S., as amended, which give the laborer's lien upon cord-wood, convinces us that the proceeding to enforce such lien is legal. The procedure is analogous to an ordinary action at law *inter partes*. Attachment is given as an ancillary remedy; a justice of the peace has jurisdiction where the amount claimed does not exceed his jurisdiction; the cause is triable by a court or jury; if a lien is proven and adjudged upon the property, the judgment is enforced by an execution in the prescribed form; and a personal judgment is rendered in favor of the plaintiff and against the defendant liable for the labor performed. These features of the proceeding lead us to class it among legal actions. It is suggested that a personal judgment is not rendered against the party liable for the debt except on failure to establish the lien. But we cannot adopt that construction of the statute. In our judgment, it would be contrary to the manifest intention of the legislature to so hold.

Further, it is said that in ch. 143, as amended, which gives this special proceeding to enforce a lien upon cord-wood, etc., there is no mention of a remedy by garnishment; therefore garnishee process cannot be resorted to in aid of the action. But we see no sufficient reason for saying that the garnishee proceeding cannot be invoked in this case. Ch. 125, R. S., provides that any creditor shall be entitled to proceed by garnishment against any person, except a municipal corporation, who shall be indebted to or have any property whatever in his possession or under his control belonging to such creditor's debtor, upon the conditions and in the manner therein prescribed. This remedy may be had by complying with the statute either at the time of the issuing of the summons, or at any time thereafter before final judgment, in any action to recover damages

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founded upon a contract express or implied. It is true, the remedy by attachment is given in the lien suit, but that is not inconsistent with the remedy given by the garnishee process. Why cannot garnishment be resorted to in aid of the lien suit, even if an attachment has been issued? We certainly can see no objection to it. But here the plaintiff did not see fit to avail himself of an attachment. He commenced the action by summons, and then instituted the garnishee proceedings. The practice seems to us to be sanctioned by the statute.

It follows from these views that the order of the circuit court must be reversed, and the cause remanded for further proceedings according to law.

By the Court.— It is so ordered.

SMITH and another, Appellants, vs. GRADY, Executor, etc., Respondent.

January 15 — February 1, 1887.

(1) Foreign judgment: Jurisdiction: Personal service of process in another county. (2) Estates of decedents: Extending time to present claims: Abuse of discretion.

1. Jurisdiction of the person of a party cannot be acquired by the service of process outside of the territorial limits of the government where the court sits, even though such party be a subject of such government, and the cause of action arose within its limits, and its laws have authorized such service and a personal judgment founded thereon.
2. A claim against a decedent based upon a foreign judgment was disallowed on the ground that such judgment was void for want of jurisdiction. *Held*, that upon application made thereafter in due time the county court should have extended the time for presenting claims, so as to allow a claim to be presented based upon the original demand upon which such judgment was founded.

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APPEALS from the Circuit Court for *Chippewa* County.

The plaintiffs duly presented to the Chippewa county court, for allowance, their verified claim against the estate of Patrick O'Donnel, the defendant's testator, founded upon a judgment recovered by them in the county court of the county of Peterborough, in the province of Ontario and dominion of Canada, against the testator in his life-time. The Chippewa county court disallowed the claim, whereupon the plaintiffs appealed to the circuit court. The circuit court also disallowed it, and from the judgment of disallowance the plaintiffs have appealed to this court.

A duly exemplified copy of the judgment roll in the Ontario court, including the judgment, was offered in evidence by the plaintiffs, from which it appears that the action, which was commenced by a writ of summons, was a personal action against the defendant for services as solicitors alleged to have been rendered him in Ontario by the plaintiffs; that the only service of such process upon the testator was made upon him personally in the county of Chippewa in this state, and that he made no appearance to the action. It also sufficiently appears, by a stipulation of facts made in the case and otherwise, that the testator resided in Ontario and was a subject of Great Britain when he became indebted to the plaintiffs; that he continued such subject until his death; that he was not a resident of Ontario and had no property therein when process was served upon him, or afterwards; that all the proceedings in the Ontario action, including the service of process in this state, are regular under the laws of Ontario, and that the judgment is authorized by such laws; also that the Peterborough county court is a court of record having jurisdiction of such actions.

The second appeal herein is from an order of the circuit court affirming an order of the county court denying the application of the plaintiffs for an extension of time to present, as a claim against the estate of the testator, the original

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demand of the plaintiffs, which is the basis of the Ontario judgment. This application was made after the order of the county court disallowing the judgment as a claim against the estate had been appealed to the circuit court, and while the matter was pending in that court.

For the appellants there were briefs by *Cole & Sleight*, and oral argument by *Mr. Cole*. To the point that constructive service or any service upon a citizen in the method laid down by the laws of the state or country of which he is a citizen, is good against him, gives jurisdiction of his person, and a judgment entered against him thereon can be recovered on, even in another state or foreign country, they cited Freeman on Judgments (3d ed.), secs. 588, 589, 590; *Schibsby v. Westenholz*, L. R. 6 Q. B. 155; *Warrener v. Kingsmill*, 8 U. C. Q. B. 407; *Burn v. Bletcher*, 23 id. 28; *Roussillon v. Roussillon*, 11 Cent. L. J. 270; *Copin v. Adamson*, 10 Eng. (Moak), 492; *S. C.* 3 Cent. L. J. 208; *Cassidy v. Leetch*, 2 Abb. N. C. 316; *Huntley v. Baker*, 33 Hun, 578; *Stockwell v. McCracken*, 109 Mass. 86; Story's Confl. of Laws (8th ed.), 3, 809; *Reynolds v. Fenton*, 3 C. B. 187; *Becquet v. MacCarthy*, 2 Barn. & A. 951, 958; *Cavan v. Stewart*, 1 Starkie, 525; *Maubourquet v. Wyse*, 1 Ir. Rep. 471; *Douglas v. Forrest*, 4 Bing. 686; *Cowan v. Braidwood*, 9 Dowl. 27; 39 Eng. C. L. 694; *Gauthier v. Blight*, 5 U. C. C. P. 122; *Bank of Australasia v. Nias*, 16 Q. B. 717; *Bank of Australasia v. Harding*, 9 C. B. 661; *Vallee v. Dumergue*, 4 Exch. 290; *La Fayette Ins. Co. v. French*, 18 How. 404; *Gibbs v. Queen's Ins. Co.* 63 N. Y. 114, 122, 127; *Hunt v. Hunt*, 72 id. 217, 237; *Godard v. Gray*, L. R. 6 Q. B. 139, 148; *McEwan v. Zimmer*, 38 Mich. 765; *Henderson v. Staniford*, 105 Mass. 504; *Hunt v. Lyle*, 8 Yerg. 142-4; *Gillespie v. Comm. Mut. M. Ins. Co.* 12 Gray, 201; *Morrison v. Underwood*, 5 Cush. 52.

For the respondent there were briefs by *Anderson & Bowe*, and oral argument by *Mr. Bowe*. To the point that

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the service of a summons outside of the territory where it is issued is simply a void proceeding so far as giving jurisdiction to render a judgment *in personam* is concerned, and that this rule is not altered by any consideration of the citizenship of the party to whom it is directed, or of the cause of action intended to be based upon it, they cited *McEwan v. Zimmer*, 38 Mich. 765; Story's Confl. of Laws, sec. 539; Wharton's Confl. of Laws, sec. 712; *Hall v. Williams*, 6 Pick. 232; *Fenton v. Garlick*, 8 Johns. 193; *Robinson v. Ward's Ex'rs*, id. 86; *Kilburn v. Woodworth*, 5 id. 37; *Peck v. Cook*, 41 Barb. 549; *Pawling v. Bird's Ex'rs*, 13 Johns. 193; *Noyes v. Butler*, 6 Barb. 615; *Jarvis v. Barrett*, 14 Wis. 594.

LYON, J. I. The only question which the first appeal herein presents for determination is, Did the service of process in this state upon Patrick O'Donnel, the defendant's testator, give the Ontario court jurisdiction of his person, so as to make valid its personal judgment against him, based entirely upon such service? Whatever validity such judgment may have in Ontario or Canada under the laws of that province or dominion, in this country the authorities are very uniform that a personal judgment, founded alone upon service of process in another state or foreign country, is void. Many of the cases which so hold are cited in the brief of counsel for the defendant. Of these *McEwan v. Zimmer*, 38 Mich. 765, is worthy of special notice. See, also, *Bischoff v. Wethered*, 9 Wall. 812.

But it is not necessary to look elsewhere for doctrine or authority on this question, for this court ruled upon the subject many years ago, in *Jarvis v. Barrett*, 14 Wis. 591. The question was there settled, and further discussion of it foreclosed, in the following terms: "It is a universally acknowledged principle that jurisdiction cannot be acquired or exercised over persons or property without the territorial

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limits of the government where the court sits, and that the legislature possesses no power to grant it. It can only be obtained of persons and property within the territory so as to be subjected to the process of the court. Jurisdiction of a defendant cannot be acquired so as to bind him *personally*, except by his voluntary appearance, or by due service of process within the state; and service out of the state is utterly nugatory and void for that purpose."

The claim against the estate of the testator being upon the void judgment alone, it was properly disallowed both by the county and circuit courts.

By the Court.—The judgment of the circuit court is affirmed.

II. On the second appeal but little need be said. The plaintiffs (or, what is the same thing, their attorneys) seem to have had great faith in the validity of the Ontario judgment, and have pursued their claim thereon against the estate of O'Donnel with great diligence and vigor until the present time. We do not think it should be regarded as unpardonable laches on their part that they failed to file a claim founded upon the original demand before the time limited by the court in the first instance for the presentation of claims, had expired. It would be an anomaly were a claimant to present together a claim against an estate on a simple contract debt, and one on a judgment for such debt. It is only after the judgment is declared invalid that the creditor can properly proceed upon the original demand. And he is not justly subject to punishment or censure if he brings the question of the validity of his judgment to this court for final determination.

Within due time after the county court held the Ontario judgment invalid, the plaintiffs made their application to that court to extend the time for creditors to present claims against the estate, to the end that they might present a claim based upon their original demand against O'Donnel.

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We see no good reason why the application was not granted. It is equitable and just that the plaintiffs should have the relief prayed, and in refusing it we think the county court went beyond the limits of a sound and just discretion.

For these reasons the order of the circuit court appealed from must be reversed, with directions to that court to reverse the order of the county court denying the application for an extension of time to present claims against the estate of O'Donnel, and to direct that court to give the plaintiffs an opportunity so to present their claim.

By the Court.—It is so ordered.

See note to this case in 31 N. W. Rep. 478.—REP.

IRVIN and others, Respondents, vs. SMITH, Appellant.

January 15 — March 1, 1887.

(1) Appeal to S. C.: Form of notice. (2) Execution: Correcting sheriff's return: Evidence.

1. Under sec. 3049, R. S., the notice of an appeal from an order or judgment need not specifically state that it is "from the whole thereof."
2. Defendant in replevin had judgment for a return of the property taken on the writ or, if a return could not be had, for its value. The officer to whom execution was issued made return thereof to the effect that a return of the property could not be had and that the execution was unsatisfied. Assuming that upon a proper showing the trial court might direct such return to be corrected or amended (a point not determined), it is *held* upon the evidence that such return was true and that no amendment should be made.

APPEAL from the Circuit Court for *Door* County.

Replevin. The cause was before this court on a former appeal, and is reported in 66 Wis. 113. After the circuit

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court had, by the order or judgment there appealed from, directed that the execution be recalled, such execution was returned to the clerk by the sheriff with the following indorsement thereon:

"*Door County — ss.* In accordance with the annexed order of court recalling the within execution I return the same unsatisfied. ARNOLD WAGENER, Sheriff of Door County, Wis."

After the reversal of such order or judgment on such former appeal the plaintiffs moved in the circuit court that the recital contained in the notice of sale of land on the execution (referred to in the opinion 66 Wis. 119), to the effect that a return of the property could not be had, be quashed and stricken out as untrue in fact and a mere inadvertent statement; also that the word "unsatisfied" be stricken out in the return indorsed upon the back of the execution, so as to make the same show, as the fact is alleged to be, that the sheriff merely returned said execution pursuant to and in obedience to the order or judgment of the court recalling the same. The circuit court granted the motion, and from the order entered accordingly the defendant appealed.

The cause was submitted for the appellant on the brief of *O. E. & Y. V. Dreutzer* and *John J. Tracy*, and for the respondents on that of *Wm. H. Timlin.*

To the point that if the sheriff's return is incorrect the court has no power to correct it or compel its correction, counsel for the appellant cited Freeman on Executions, 358, 361; *Gaubot v. Du Crouy*, 2 Dowl. P. Cas. 86; *Evans v. Parker*, 20 Wend. 622; 1 Carr. & M. 772; *Wash. Mill Co. v. Kinnear*, 1 Wash. Ter. 99; *Humphries v. Lawson*, 7 Ark. 341; *Sawyer v. Curtis*, 2 Ashm. (Pa.), 127; *Whitaker v. Sumner*, 19 Am. Dec. 298; *Gardner v. Hosmer*, 6 Mass. 325; *Stevens v. Brown*, 23 Am. Dec. 215; *Townsend v. Olin*, 5 Wis. 207; Crocker on Sheriffs, sec. 46; *Stinson v. Snow*, 25 Am. Dec.

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238; *S. C.* 10 Me. 263; *Taylor v. Lewis*, 19 Am. Dec. 135; *S. C.* 2 J. J. Marsh. 400; *Blythe v. Richards*, 13 Am. Dec. 672; *S. C.* 10 Serg. & R. 261; *Deller v. Roberts*, 15 Am. Dec. 578; *S. C.* 13 Serg. & R. 60; *Bank of Gallipolis v. Domigan*, 12 Ohio, 220; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528; *Piper v. Elwood*, 4 Denio, 165; 61 Ind. 478; 5 Barb. 110; 11 id. 481; 5 Cal. 53; *Holt v. Robinson*, 56 Am. Dec. 240.

To the point that the return of a sheriff may upon proper proofs be quashed or corrected upon application by a sheriff, or by a purchaser or a party, counsel for the respondents cited 2 Phillips on Evi. (Cowen & Hill's notes), page 376, ch. 5, and cases cited; *McMichael v. Bank of Montgomery*, 14 Ala. 498; *Forsyth v. Mariott*, 1 Bos. & P. 251; *Burks v. Maine*, 16 East, 2; *Williams v. Rogers*, 5 Johns. 163; *Flanagan v. Tinin*, 37 How. Pr. 130.

Cole, C. J. A motion was made to dismiss the appeal herein, which has been decided, but no opinion was given on the motion. It is thought advisable to state here our views upon the question of practice involved in the motion. The ground of the motion was that no notice of appeal such as is required by law was ever served. After entitling the cause, the notice states "that the defendant appeals to the supreme court from the order of the circuit court entered on the 26th day of July, 1886, in the above-entitled cause." The objection to this notice is that it fails to state whether the appeal is from the whole or some part of the order. The statute requires a notice in writing to be served on the adverse party and on the clerk of the court in which the judgment or order appealed from is entered, "stating the appeal from the same, and whether the appeal is from the whole or some part thereof; and if from a part only, specifying the part appealed from." Sec. 3049, R. S. Now, when a party appeals from an entire order or judgment, it

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is said the notice must state that the appeal is from "*the whole thereof*," or the notice will be defective. We do not think that this is the meaning of the statute. Where the appeal is from an order or a judgment, the necessary implication is that it is from the whole of the order or judgment. Saying, in such a case, that the appeal is from the "whole thereof," is mere tautology and adds nothing to the sense. The object of the statute is, where an appeal is from a part of an order or judgment, that the notice shall specify the part appealed from. But no such statement is necessary when the appeal is from an order or judgment, because, as we have said, the plain implication is that the appeal is from the whole of such order or judgment. For these reasons we deem the notice of appeal in this case sufficient. In *Olinger v. Liddle*, 55 Wis. 621, which counsel relied on to support his motion to dismiss, there was an attempt to include two judgments in one appeal. It was claimed that the statement in the notice that the appellant "appeals from the whole and every part thereof" referred only to one judgment. But this court held that the specification referred to both judgments, and that both could be reviewed were such appeals admissible. The decision has no particular application to this case.

The order appealed from in this case directed that the recital contained in the notice of sale of land on execution, referred to in the opinion of this court (66 Wis. 119), to the effect that a return of the property could not be had, be quashed and stricken out; also that the return of the sheriff on the back of the execution be corrected by striking therefrom the word "unsatisfied."

The sheriff was not a party to this proceeding, nor did he ask that his return be corrected because it was false or not according to the real facts; and the counsel for the appellant insists that the court had no power whatever to quash the return made on the execution by the sheriff, with-

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out the request of that officer. He says the return was conclusive upon the parties, and that even upon the application of the sheriff himself he would not be allowed to impeach or contradict it. The officer is responsible for his return, and if it is false in any respect the injured party has his action for damages against him. There is a very strong intimation in the former opinion that this view of the law is correct, but under the circumstances we do not feel called upon to determine whether or not the court, on a proper showing, would have the power of directing the return to be amended, as was done here; for we are entirely satisfied upon the evidence that the property seized and taken from the appellant could not be returned, or at least was never tendered to him; therefore there was no mistake or omission to be corrected or supplied in the return as it stood originally.

Considering then the case upon the merits, as was done in the court below, the inquiry is, Do the affidavits and testimony taken before the referee justify the conclusion that the property adjudged to the appellant could not be returned to him? For unless substantially the same railroad ties, fence posts, and telegraph poles which were taken from him on the writ of replevin could be returned or tendered, the word "unsatisfied" should not have been stricken from the back of the execution. This is very obvious. What then are the facts in regard to that matter? There is considerable contradiction in the statements of the witnesses who were examined, and in the affidavits used on both sides, on the hearing of the rule to show cause. But to our minds the decided weight of testimony clearly proves that the identical property taken from the appellant and delivered to the plaintiffs, was not found and could not be returned. Of course, it was incumbent upon the plaintiffs to show that a return of the property could be had, and that a tender of it was made. The property was

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put into their possession or under their control, and they should return it or pay for it. If it has been lost, they are responsible for it. It would be unprofitable to state at any length the testimony bearing on the question of fact as to whether a return of the property could be had. Marshall, who was the agent of the plaintiffs and had the control and management of the property, says that part of the timber remains unmoved on the creek in the same place where it was found by the sheriff when seized, and in the same condition, and that the remaining portion is piled on the bank of and close by the waters of the slough in which it was found by the sheriff when taken on the writ; and that it is in a better position and worth as much piled on the bank of the slough as it would be floating in the waters thereof. The witness Jacobson fully corroborates this statement, both in his affidavit and in his testimony before the referee. This witness, some time in the summer, removed, by the order of Marshall, the property from the waters of the slough and piled it higher up on the bank, where it remained. There are one or two other witnesses who slightly corroborate the statement that the identical property taken could be returned or was tendered. The under-sheriff, Wagener, who aided in executing the writ of replevin, says he found a portion of the ties and posts in the woods along and upon a certain creek which empties into the head of North bay, where they were seized but not removed; that these ties and posts were turned over to the plaintiffs; that in another place about a mile distant, in the waters of a slough or bayou which opens into North bay near its head, were the remainder of the posts, ties, and telegraph poles seized on the writ; that on account of the character of the property, and the depth and temperature of the water of the slough in which the property was afloat, it was impracticable to make an actual seizure of the same; that the seizure made was symbolical merely,

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and consisted only in marking several pieces of timber and placing the property in the custody of Jacobson without removing it, and also in putting a boom between the waters of North bay and the slough, so as to keep the ties, posts, and poles within the slough. But this officer could not positively identify the ties, posts, and poles piled upon the bank of the slough as being the same as those which were seized on the writ. This is the most material testimony tending to prove that the same property taken was tendered, or could be returned.

But this evidence was met and overcome by an overwhelming mass of testimony that a large portion of the ties and posts seized by the sheriff was not tendered, but that ties and posts of an inferior grade and quality were tendered and offered to be returned. Aside from the sworn statements of the appellant, which are direct and positive on the point, there is the testimony of six or seven credible witnesses who worked for the appellant, chopped the ties, posts, and poles, or who hauled them to the slough, and who swear as to the character and quality of the timber cut and hauled. The fact is conclusively established by these witnesses that the ties, posts, and poles chopped, sawed, and hauled were mostly manufactured from green trees, contained but a small percentage of culls, and were of a good quality and merchantable. The fact was proven beyond successful contradiction that a large portion of the ties, posts, and poles piled on the bank of the slough was, to use the words of one of plaintiff's witnesses (Tellofson), "poor stuff; looked poorer than any large lot of stuff I ever saw gotten out by anybody. Much of it looked like the leavings of an old banking ground." This is the character of the timber which was offered to be returned. The appellant does not deny but that some of the ties and posts piled at that place were taken from his possession, but he says that these were so intermixed with worthless stuff and

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driftwood that they could not be separated without great labor and expense. It is entirely clear that the timber piled on the bank of the slough was not the same as that deposited in the slough by the appellant and which was seized by the sheriff under the writ. This fact is established by irrefragable proof. It was likewise shown by the witnesses Tweedale and Madden that about two thousand pieces were taken from the slough by one Larkin in the summer of 1883, all good merchantable timber. It is a fair presumption that these pieces were some deposited in the slough by the appellant.

Now, in the light of all this evidence, it is impossible to say there was anything untrue or false in the return. The court below therefore erred in amending it and ordering that the word "unsatisfied" be stricken from the back of the execution; for no one would claim that the execution could be satisfied by tendering other timber of an inferior quality from that actually seized on the writ of replevin. So, assuming that the court on a proper showing had power to order the return of the officer to be amended, it is obvious that no amendment should have been made upon the facts disclosed in the testimony.

By the Court.—The order of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

IRVIN and others, Respondents, vs. SMITH, Appellant.

January 15 — March 1, 1887.

(1) Replevin: Return of property: Identity: Evidence. (2) Costs: Two appeals: Printed case.

1. Upon the evidence in this case it is *held* that ties, posts, and telegraph poles tendered to the defendant by the plaintiffs were not the identical property taken from him under a writ of replevin, and

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that he was therefore not bound to accept them in satisfaction of a judgment in his favor for the return of such property.

2. There were two appeals by the same party in one cause, and the printed case on one appeal was identical with the first ninety-one pages of the printed case on the other appeal. *Held*, that in taxing costs the appellant should be allowed for only one printed case on both appeals.

APPEAL from the Circuit Court for *Door* County.

This appeal is in the same cause as that last reported (*ante*, p. 220). After obtaining the order there appealed from the plaintiffs moved that the original judgment in favor of the defendant be ordered satisfied by a return of the property therein described, and that the defendant have and accept in satisfaction of such judgment the property which had been tendered to him by the plaintiffs. The motion was granted, and the defendant appealed from the order made thereon.

The cause was submitted for the appellant on the brief of *O. E. & Y. V. Dreutzer* and *John J. Tracy*, and for the respondents on that of *Wm. H. Timlin*.

COLE, C. J. This is an appeal from an order directing that the judgment rendered September 27, 1884, be satisfied, and further ordering that the property described in such judgment "be, and the same is, the property of the defendant." This order is based upon the assumption that the property seized on the writ of replevin has been tendered to the defendant, and that this satisfies the judgment.

In the opinion on the other appeal we have stated that the decided weight of evidence clearly shows that the ties, posts, and poles which were taken from the defendant were not returned or offered, but that ties, posts, and poles of an inferior quality were tendered, which the defendant was not bound to accept. We only referred to some of the items of evidence which to our minds fully warranted that conclu-

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sion. We are favored with the opinion of the learned circuit judge on the motion that the defendant be required to accept and have in satisfaction of the judgment the property offered, etc., in which he says: "On all the evidence taken on the reference and the affidavits I was convinced that the property offered the defendant was the identical property taken from him on the writ of replevin. Upon a careful review of the record I see no reason to change my opinion. I cannot divest myself of the knowledge of this case and the facts derived from presiding at the trial before the jury, where there was much testimony as to the ties; and it may be that the testimony and affidavits on which this motion is based, viewed in the light of prior knowledge, make a different impression on my mind from that produced on the mind of a party who had not known of the case before." This remark may account for the total disagreement of the circuit judge with the members of this court as to the facts. And still he had no other evidence before him than the written evidence contained in this record. We have no knowledge of the case except what is obtained from the record itself, and we can have no impression in regard to it which is derived from other sources of information. We are compelled to decide the case upon the record. We have stated on the other appeal that the evidence to our minds was most clear, satisfactory, and convincing that the timber tendered was not the timber taken from the defendant. Therefore he was not bound to receive it. We refer to the timber piled up on the bank of the slough, which constituted the larger portion. We did not overlook the testimony of Marshall and Jacobson, who swore that the stuff on the bank of the slough was the same as that taken from the defendant. But the truth of that statement was amply disproved by the evidence offered on the part of the defendant. Besides the defendant's testimony on the point, seven or eight witnesses who were employed by him in the winter of

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1882–83 to saw, cut, and haul ties, posts, and poles to the slough, testified that most of the stuff manufactured was from green trees; had only about five culls to the hundred; that the ties, posts, and poles were of good quality and merchantable. Now, the testimony is quite uniform as to the quality of the stuff on the bank of the slough, that it is poor, much of it rotten, and one-half culls. The learned counsel for the plaintiff says that the testimony of the witnesses who manufactured and hauled the ties, posts, and poles to the slough, as to their identity, is of no probative effect and really amounts to nothing. This is a summary way of disposing of adverse testimony. We cannot so ignore it. But we shall not further discuss the facts. We have stated our conclusion upon the evidence, that the ties, posts, and poles piled upon the bank of the slough are not substantially the same as those seized by the sheriff; and, as we have said, the defendant was under no obligation to accept them in satisfaction of the judgment.

In this case the order must be reversed, and the cause remanded with directions to ascertain the costs of this investigation, which must be paid by the plaintiffs. An execution should be awarded to collect these costs and also the value of the property as found by the jury, with interest.

In the taxation of costs in this court the clerk will only allow for one printed case on both appeals. The first ninety-one pages of the cases used on both appeals are the same, and it was unnecessary to do more on the second appeal than refer to the case on the first appeal.

By the Court.— Order reversed, and cause remanded for further proceedings according to the directions above given.

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CHILDS and another, Respondents, vs. THE HARRIS MANUFACTURING COMPANY, Appellant.

February 1 — March 1, 1887.

Joinder of causes of action: Judgment is a "contract."

A judgment for the payment of money only is a *contract* within the meaning of subd. 2, sec. 2647, R. S., authorizing the joinder of several causes of action when they arise out of contract, express or implied.

APPEAL from the Circuit Court for *Rock* County.

The case is stated in the opinion.

Wm. Ruger, for the appellant.

For the respondents there was a brief by *Dunwiddie & Goldin*, and oral argument by *Mr. Dunwiddie*. They cited, besides authorities cited in the opinion: *Union C. M. Co. v. Lobdell*, 13 Johns. 462; *Stuart v. Lander*, 16 Cal. 373; *Morse v. Tappan*, 3 Gray, 411; *McGuire v. Gallagher*, 2 Sandf. 402; *Mandis v. Terrell*, 22 Miss. 327; *Tillotson v. Stipp*, 1 Black, 77; Id. 102; *Hogsett v. Ellis*, 17 Mich. 351; 6 How. Pr. 381.

TAYLOR, J. The respondents brought an action in the circuit court against the appellant, and in their complaint set up two separate causes of action,— one upon a judgment rendered in favor of the respondents and against the appellant in an action pending in the supreme court of the state of New York, for the sum of $3,288.60 damages and costs; and the other to recover damages for the breach of an express contract. The defendant demurred to the complaint on the ground that the causes of action were improperly joined. The circuit court overruled the demurrer, and from the order overruling such demurrer the defendant appealed to this court.

The only question to be determined upon this appeal is whether a judgment for the payment of money only is evi-

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dence of a contract, either express or implied, on the part of the person against whom the judgment is rendered, to pay the amount of the judgment to the person in whose favor the same is rendered, within the meaning of subd. 2, sec. 2647, R. S. This subdivision reads as follows: "The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or both, when they arise out of . . . (2) contract express or implied." The learned counsel for the appellant contends that a judgment is neither a contract express or implied, within the meaning of said section.

When we consider the object of sec. 2647, we think it very clear that the legislature intended to use the word "contract" in said subdivision in its largest sense, and not in a restricted sense. The object of the section as a whole is to classify causes of action with reference to their joinder in one and the same action; and it attempts to give general rules for the joinder or non-joinder of all actions. We must take it for granted that the legislature knew that actions upon judgments were a common class of actions, and that the legislature contemplated that it had made provision in said section for the classification of such actions. Unless an action upon a judgment is an action upon contract, express or implied, within the meaning of said subd. 2, then actions upon judgments are not included within any of the provisions of said section, and are entirely unprovided for by the legislative classification. In this view of the subject, notwithstanding the fact that in other parts of the statutes, and for other purposes, the legislature seems to have made a distinction between contracts and judgments, that fact furnishes no good reason for holding that, in said sec. 2647, the word "contract" was not intended to be used in its larger meaning, so as to cover a case of a judgment for the payment of money.

Judgments have always been classed by writers upon

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elementary law as contracts, and the writers on code practice have always taken it for granted that they were contracts within the meaning of the statute which declares that actions upon contracts, express or implied, may be joined in the same action. See 2 Bl. Comm. 465; Chit. Cont. 112; Story, Cont. 2; 1 Pars. Cont. 4–8; Van Santv. Pl. (Moak's 3d ed.), 104; 2 Wait, Pr. 365. See, also, *Barnes v. Smith*, 16 Abb. Pr. 420; *Mahaney v. Penman*, 4 Duer, 603; and the cases cited in the brief of the learned counsel for the respondents.

A judgment for the payment of money, rendered by a court which has jurisdiction of the persons of the parties and the subject matter of the action, is conclusive evidence in all places that the party against whom the judgment is rendered is indebted in the amount of the judgment to the party in whose favor it is rendered, and consequently there is an implied promise on the part of the judgment debtor to pay the amount to the party in whose favor the judgment is so rendered.

This court, as well as the courts of New York, has held that under the Code an action for money had and received may be united with a cause of action upon an express contract, even where such action for money had and received arises out of a fraud or other wrong committed by the defendant, and that such action for money had and received is an action upon contract, within the meaning of the law for joinder of causes of action. See *Freer v. Denton*, 61 N. Y. 492; *Hawk v. Thorn*, 54 Barb. 164. If such actions for money had and received may be joined with an action upon an express contract, on the ground that in such cases the law implies a promise to pay the money so fraudulently obtained, there does not seem to be any objection to the joinder of an action upon a judgment and an action upon an express contract, as in the case of the judgment the implied promise to pay the same is conclusively proved by the production of the record.

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We are strongly inclined to believe that the want of any very direct authorities upon this question arises out of the general understanding of the bar that under the statute it has been taken for granted that a judgment is a *contract*, within the meaning of the statute classifying the causes of action which may be joined, rather than from the lack of a disposition on the part of the profession to contest all doubtful questions of practice.

By the Court.— The order of the circuit court is affirmed.

FROST, Assignee, etc., Appellant, vs. CITIZENS' NATIONAL BANK OF BELOIT and another, Respondents.

February 1 — March 1, 1887.

CHATTEL MORTGAGES: VOLUNTARY ASSIGNMENT. *(1) Description of property in mortgage: Certainty: Delivery. (2) Fraudulent conveyance: Remedy of assignee.*

1. Where the mortgagor identifies and delivers to the mortgagee certain property as being that covered by a chattel mortgage, and the mortgagee takes full possession thereof with the consent of the mortgagor before the execution by the latter of an assignment for the benefit of his creditors, any insufficiency or want of certainty in the description of the property in the mortgage is thereby cured, both as against the mortgagor and his assignee for the benefit of creditors, the latter having only the same rights in this respect as his assignor.
2. An assignee for the benefit of creditors cannot maintain replevin for property on the ground that it was fraudulently transferred by his assignor prior to the execution of the assignment: following *Kloeckner v. Bergstrom*, 67 Wis. 197, and *Chas. Baumbach Co. v. Miller*, id. 449.

APPEAL from the Circuit Court for *Rock* County.

Replevin. The facts will sufficiently appear from the opinion.

Wm. Ruger, for the appellant.

A. A. Jackson and *B. M. Malone*, for the respondents.

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ORTON, J. It appears that the firm of Hinman, Moody & Co., on the 5th day of September, 1883, executed a chattel mortgage upon the goods described in the complaint, to the respondent bank, to secure certain promissory notes therein described, and that said mortgage was duly filed in the clerk's office of the city of Beloit on the 2d day of November thereafter. The said firm thereafter, and about the 5th day of November, 1883, made a voluntary assignment for the benefit of their creditors, of all of their property, including the goods which had been so mortgaged to said bank, to the appellant. The said goods, being found in the possession of said bank, were demanded by the appellant as such assignee, and upon said bank's refusal to deliver the same the appellant brought this action of replevin to recover the possession thereof. A jury having been waived, the circuit court found all the issues in favor of the defendants, and judgment was entered accordingly, and this appeal is taken therefrom.

The two main grounds assumed and sought to be maintained by the appellant upon the trial of this action were (1) that the goods described in the complaint and taken by the writ were not those described in and conveyed by said mortgage; and (2) that if they were the same goods the said bank could not withhold the same from the appellant as such assignee, because said mortgage was void for the reason that it was made by said Hinman, Moody & Co., with intent to hinder, delay, or defraud their creditors; and these grounds, on the merits, are urged in this court to reverse the judgment.

The first ground rests upon the uncertain and insufficient description and identity of the goods mortgaged to and taken possession of by the said bank; and it is claimed by the learned counsel of the appellant that the said bank, as such mortgagee, has shown no right to said goods. The description of the goods in the mortgage is as follows:

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"2 Potter power presses; 1 Taylor power press; 1 Hoe pony press; 1 stereotype outfit, together with all its tools and supplies; 4 cases and stands, with the type and letters therein; 20 tons manilla paper; 40 tons dry goods paper; 60 tons straw paper; 60 tons rag paper; 15 tons sugar paper; 400,000 paper bags; 75,000 envelopes; 2 tons twine and cords; 2,000 lbs. writing paper; and the several lots of blank books,—said property situated and being now at their warehouse, next south of the east side Rock River Paper Co.'s mill, in the city of Beloit," etc. Many of these articles would appear to have been sufficiently described in themselves, and all of them sufficiently identified as being in said warehouse so long as they remained in that place. But it is contended that sales were made of many of the articles, which were supplied by others manufactured or purchased, in such way that their identity has been made impossible as being the goods mortgaged.

The following findings of the circuit court are pertinent to the question of the identity of the goods: "*Second.* That at the time of making said assignment, and before it was made, the goods and chattels mentioned in the complaint herein were included in and covered by a certain chattel mortgage duly executed by said firm of Hinman, Moody & Co., on the 5th day of September, 1883, and bearing date September 5, 1883, and which was duly filed in the office of the clerk of the city of Beloit on the 2d day of November, 1883, at 3 25-60 o'clock in the afternoon of that day." "*Seventh.* That shortly prior to the time of giving the mortgage, Moses S. Hinman, the managing partner of said firm at Beloit, pointed out to *C. B. Salmon*, the cashier and one of the stockholders of the *Citizens' National Bank of Beloit*, the property intended to be covered by said mortgage, and at the request of *Salmon* furnished a memorandum of the same property thus pointed out to be included in the mortgage, and which was afterwards included in the

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same." "*Eighth.* That on the 3d day of November, 1883, Moses S. Hinman pointed out to *C. B. Salmon*, the cashier of said bank, the property covered by the said mortgage, which property was afterwards, on the 5th day of November, 1883, prior to the execution and delivery of said assignment, seized and taken possession of by the agents and officers of said bank under and by virtue of said chattel mortgage; all of which property remained in the possession of said officers and agents, under said mortgage, until the same was disposed of by them under and by virtue of said mortgage in the month of December, 1883, prior to the commencement of this action; and that said Moses S. Hinman again on the 6th day of December, 1883, after the property had been seized on said mortgage as before found, pointed out the same property to the officers and agents of said bank as and for the property included in said mortgage; and that there was a schedule made and attached to said assignment, made on or about the 15th day of November, 1883, and that on the said schedule of property so attached to the assignment is this memorandum, viz.: 'All the foregoing goods and chattels enumerated in Schedule A, class 4, at Beloit, Wis., are subject to a chattel mortgage, dated September 5, 1883, executed by Hinman, Moody & Co., to the *Citizens' National Bank of Beloit, Wis.*' That this memorandum referred to the said chattel mortgage executed September 5, 1883, by the said Hinman, Moody & Co., to the *Citizens' National Bank of Beloit;* and at the time this memorandum was made the property referred to was in the possession of said mortgagee, its officers and agents, and was and is the same property to recover which, or its value, this action is brought, and was and is the same property seized under and by virtue of said mortgage." There is another finding, in effect, that said bank was the lawful owner and lawfully entitled to the possession of all and singular the said property prior to the execution and delivery

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of said assignment, and was lawfully in possession of the same under and by virtue of said mortgage, and remained in the actual and continuous possession thereof until sold as aforesaid.

The testimony was amply sufficient to sustain these findings. The appellant, *Frost*, the officer, Allen, and the cashier, *Salmon*, concurred in testifying that the property was in the possession of the bank; and *Salmon* and Hinman testified that it was pointed out by Hinman as being covered by the mortgage before the execution and delivery of the assignment. The appellant, as such assignee, on the 6th day of November thereafter, served upon the officers of said bank a written demand for the bank to surrender such possession to him "of all and singular the property mentioned in a certain mortgage dated September 5, 1883, and which purports to have been executed by said Hinman, Moody & Co., to the *Citizens' National Bank of Beloit, Wis.*," preparatory to the commencement of this action. As between the parties to the mortgage, these findings, so sustained by the evidence, dispose of the question of the certainty of description and identity of the property, for their legal effect is that said firm of Hinman, Moody & Co. specially identified, turned out and delivered to the bank as the mortgagee the said property as that which was described in and conveyed by the mortgage, and that the bank took full possession thereof, by the consent of the said mortgagors, before the execution of said assignment. This cures any insufficiency or want of certainty of description of the property.

This identical question, and upon very similar evidence, was so decided by this court in *Morrow v. Reed*, 30 Wis. 81. There one of the mortgagors went with the mortgagee to the place where it was claimed the logs were situated, and *pointed out* to him those that were covered by the mortgage, and as far as practicable delivered them to him. The

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present chief justice said in his opinion in that case: "If this was done as claimed, it would cure any defect in the mortgages on account of any imperfect description of the logs, or in respect to after-acquired property, . . . For it would be an appropriation of the specific logs to the mortgages and a designation of the property to which they were to attach. . . . If the mortgagee takes possession of the mortgaged property, that is sufficient. That is an identification and appropriation of the specific property to the mortgagees." See Jones, Chat. Mortg. § 60, and *Savings Bank v. Sargent*, 20 Kan. 576. If, then, there was any uncertainty of description or identity, it was cured so far as the mortgagors and assignors are concerned, and therefore, also, as to the appellant as the assignee, whose right in this respect is the same as that of the assignors. *Powers v. C. H. Hamilton Paper Co.* 60 Wis. 23; *Hawks v. Pritzlaff*, 51 Wis. 160. This disposes of the first ground of attack upon the mortgage. The appellant, as the assignee, had the right to insist in this action that the property was not embraced in the mortgage, and was not, therefore, lawfully taken or retained even as against the mortgagor and assignor.

This leaves the appellant, as such assignee, in the attitude of seeking to recover in this action the possession of the property or its value, from the bank as the mortgagee in possession under its mortgage from the assignors, on the sole ground that said mortgage is void because it was made by Hinman, Moody & Co., as the mortgagors, with the intent to hinder, delay, or defraud their creditors. It is only so far as the appellant, as such assignee, may represent the other creditors of the assignors that he can question the validity of the mortgage on that ground; and it is in their right and interest only that this action is brought or could be maintained; for the mortgagors themselves could not thus question their mortgage. *Dietrich v. Koch*, 35 Wis. 618. In view of the

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present statutes on the subject,—and I need not cite them in this opinion,—this court has recently held that an assignee cannot in this action question or seek to set aside a prior mortgage of his assignor on that ground, and that his rights of action are co-extensive only with those of the creditors he represents, and he must resort to such actions or proceedings for such purpose as the creditors themselves have the right to bring irrespective of the assignment. I do not seek to construe, enlarge upon, or modify, but only to cite, these decisions, as fatal to this action. These cases were fully and carefully considered; and we see no good reason for changing the opinions therein expressed. They are *Kloeckner v. Bergstrom*, 67 Wis. 197, and *Charles Baumbach Co. v. Miller*, 67 Wis. 449. We were forced to make these decisions by the clear and unquestionable limitations of the statutes themselves. The assignee is authorized only to bring and maintain an action *to avoid* such fraudulent conveyances, etc., or to *set aside and avoid*, or *to vacate*, such conveyances, and if the assignee shall neglect for sixty days to institute proper suit *to vacate* such fraudulent or preferential conveyance, it shall be lawful for any creditor of the assignor to institute and prosecute to judgment *any such suit*. Any such suit must be a suit in equity for the affirmative relief, to set aside, avoid, or *vacate* such conveyance, or such a suit as a creditor may bring. "The assignee shall be considered as representing the rights and interests of the creditors." These are the limitations which forbid the bringing of replevin or trover, which involve the right of possession merely, which is not vested in the creditors or the assignee as against the possession of a mortgagee. It might be well for the legislature to provide that an assignee might bring and maintain an action, *legal* or equitable, for the possession or the value of any property of the assignor against any one unlawfully withholding it; but the assignee would not, in any such legal action, represent either the creditor

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or the debtor, although it might ultimately be for the creditor's benefit. But as yet the legislature has not done so, and this court can only enforce the law as we find it.

So far, then, as the circuit court had cognizance of this action, we find no error in the record, and it not having had cognizance of the question whether the mortgage was given with intent to hinder, delay, or defraud creditors, we abstain from expressing any opinion upon it.

By the Court.— The judgment of the circuit court is affirmed.

See note to this case in 32 N. W. Rep. 111.—REP.

MEINZER, Respondent, vs. THE CITY OF RACINE, Appellant.

February 2 — March 1, 1887.

Municipal corporations: Unauthorized change in grade of street.

An action will lie against a city for injuries to a lot caused by a change in the grade of a street otherwise than as authorized by law, and in violation of legal restrictions.

APPEAL from the Circuit Court for *Racine* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

This is an appeal from an order overruling a demurrer to the amended complaint, alleging, in effect, that ever since 1883 the plaintiff has been and still is the owner of the land described; that during said time there has been and now is a public street used as such, known as Twelfth street, in said city, passing and located along the northerly side of said premises and affording the only convenient means of access to said premises; that during said time there has been and is now a dwelling-house, out-buildings, etc., upon said premises occupied by the plaintiff as his homestead; that

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during said time and until the wrongful acts complained of there was a convenient drive-way leading from said street in front of said premises to said dwelling-house and out-buildings; that during May and June, 1884, the defendant wrongfully and unlawfully, and to the great injury and damage of the plaintiff, dug up, excavated, and took away the earth and other material in said street adjacent to and upon the premises of the plaintiff, to the depth of from eight to nine feet, and removed the same from said premises and the highway adjacent thereto, by means whereof the plaintiff has been greatly inconvenienced and disturbed in the use and enjoyment of said dwelling-house and premises, and his drive-way and entrance upon said premises with any kind of vehicle or conveyance has thereby been destroyed, his fences undermined, and said dwelling-house and premises made inconvenient, difficult of access, and undesirable as a residence, and permanently depreciated in value; that the city committed said wrongful acts and trespasses in the pretended exercise of her power under her charter to grade the streets therein, including said Twelfth street at the places in question; but that, prior to such grading, the common council of said city had not made, nor caused to be made, any estimate of the cost of such work, nor put any such estimate on file in their office open to the inspection of parties interested; that said common council claim and pretend that such work or the cost thereof is chargeable to the plaintiff's said premises as fronting the same; that said work is such that if it were lawfully done it would be chargeable to said premises; that said work does not consist of docking, nor dredging, nor building of sidewalks or gutters; that no petition was ever presented to the common council, signed by the residents of the city owning a majority of the feet in front of all the lots fronting upon the proposed improvements owned by residents of the city, nor was any petition for doing such work pre-

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sented to said city council; that no resolution ordering such work ever received three fourths of the votes of the aldermen elected, nor was any such resolution passed by said common council declaring why it was for the public interest to proceed with such petition as aforesaid, nor was any such resolution passed after permitting the same to lie over one week after being introduced and first considered, nor was the vote on any such resolution taken by yeas and nays and entered in the journal of the council; that a majority of feet in front of all the lots in the block in which said premises are situated is owned by residents of said city; that no order was ever made by said city council, before commencing to work, requiring or ordering the plaintiff, as such owner, to do such grading, nor was the amount proposed to be made chargeable against the several lots or pieces of land in front thereof, nor the benefits which in their opinion would actually accrue to the owners of the same in consequence of such grading, ever ascertained or considered by said common council; that no notice was ever given to the plaintiff requiring him to do said work, nor was said work thereafter let by contract, as required by the charter; that by reason of such unlawful acts, the plaintiff had sustained damages in the premises in the sum of $2,000, and demands judgment for that amount and costs.

For the appellant there was a brief by *D. H. Flett*, attorney, and *Samuel Ritchie*, of counsel, and oral argument by *Mr. Flett*.

For the respondent there was a brief by *Quarles & Spence*, and oral argument by *Mr. Spence*. They cited *Crossett v. Janesville*, 28 Wis. 420; *Dore v. Milwaukee*, 42 id. 108; *Dorman v. Jacksonville*, 7 Am. Rep. 253, note, 260; *Hall v. Chippewa Falls*, 47 Wis. 267; *Starr v. Burlington*, 45 Iowa, 87; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Hill v. St. Louis*, 59 Mo. 412; *Dyer v. St. Paul*, 27 Minn. 457; *O'Brien v. St. Paul*, 25 id. 334.

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CASSODAY, J. The common council of the city had the power, when properly invoked, to "open, widen, straighten, and vacate streets and alleys and establish and alter the grades thereof." Charter, subd. 32, sec. 3, tit. IV, ch. 313, Laws of 1876, p. 733. There is no claim, and the complaint negatives any ground for claiming, that the alleged improvement was the taking of the plaintiff's private property,— the land in question,— for a public street by any proceedings for condemnation as prescribed by the charter. Secs. 1–24, tit. V. The common council may cause any street to be graded, paved, macadamized, or graveled, and order the expense of such improvements to be ascertained, and the costs of such work or improvement to be levied and charged against the lots or real estate fronting or abutting on such street, to the amount which such improvement shall be adjudged by the common council to benefit such lots; and when a change in the grade of any street is ordered, the expense of cutting or filling incurred by such change of grade shall be chargeable to and paid by special assessment on the lots or property fronting or abutting on the street of which the grade shall be so changed. Charter, sec. 1, tit. VI, ch. 180, Laws of 1880. Whenever the common council shall deem it necessary to grade or otherwise improve any street not otherwise provided for, it shall cause to be made an estimate of the costs of such work, and shall put the same on file in its office; and such estimate shall be open to inspection of any party interested. Sec. 5, Id. No such work chargeable to lots or parcels of land fronting or abutting on the same, except repairs, etc., shall be ordered unless the requisite petition therefor shall be first presented to the common council, or unless, in the absence of such petition, the requisite resolution of the common council ordering such work, after having laid over for one meeting, shall receive the votes of three fourths of the aldermen elected, to be taken by yeas and nays duly en-

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tered in the journal of the proceedings. *Ibid.* Before ordering any such work to be done by the owner of lots or lands fronting on the same, the common council shall ascertain and consider the amount proposed to be made chargeable against said several lots or pieces of land, and the benefits which in its opinion will actually accrue to the owners of the same in consequence of such improvement, and assess against the same, respectively, the amount of such benefit; and in case such benefits amount to less than the cost of the improvements, the balance shall be paid out of the ward fund in which the improvement is made. Sec. 6, Id. As soon as any such assessment shall be made, the requisite notices shall be given to the owners of such land and all parties interested. Secs. 7, 8, Id.

The complaint alleges, in effect, that the common council claim and pretend that such work, or the cost thereof, is chargeable to the plaintiff's said premises, as fronting the same, and that the said work is such that if it were lawfully done it would be chargeable to said plaintiff's lot. It then negatives the claim that said work is of any different kind or character than above mentioned; also the making or presenting of such or any petition; also such passage or any passage of any such resolution; also the taking of any such vote. The complaint also alleges affirmatively that the defendant wrongfully and unlawfully did the several acts complained of. We must hold the allegations of the complaint sufficient to bring the case within the decisions of *Crossett v. Janesville*, 28 Wis. 420; *Dore v. Milwaukee*, 42 Wis. 108. It is true the charter expressly prohibited the improvement made in the *Crossett Case* in the absence of the requisite recommendation in writing. The same may be fairly implied, as to the particular work in question, from the provisions of the Racine charter referred to. It is to be remembered that the common council only had such powers as were expressly granted by statute or necessarily

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implied therefrom. *Mayor v. Hughes*, 1 Gill & J. 480, 19 Am. Dec. 243; *Collins v. Hatch*, 18 Ohio, 523, 51 Am. Dec. 465; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385; *State v. Comm'rs of Mansfield*, 23 N. J. Law, 510, 57 Am. Dec. 409; *Davis v. Mayor*, 14 N. Y. 506, 67 Am. Dec. 186; *Logan City v. Buck*, 4 Am. & Eng. Corp. Cas. 300; *Whelen's Appeal*, 108 Pa. St. 162; *Fertilizing Co. v. Hyde Park*, 97 U. S. 660; *State ex rel. Priest v. Regents*, 54 Wis. 170; *Gilman v. Milwaukee*, 61 Wis. 592; *Attorney General v. Great Eastern Ry.* 33 Eng. (Moak), 768. With this view of the law, and the allegations of the complaint being such as to preclude any right to make the improvement in question at the expense of the city or the ward, as in some of the cases cited, the unlawfulness of the acts complained of is apparent.

By the Court.— The order of the circuit court is affirmed.

JOINT SCHOOL DISTRICT NO. 7 OF THE TOWNS OF BRIGHTON AND PARIS IN KENOSHA COUNTY, Appellant, vs. KEMEN and others, Respondents.

February 2 — March 1, 1887.

APPEAL TO S. C. *(1) When judgment appealable. (2) Appealable order.*

1. A judgment is not appealable until the costs have been taxed and inserted therein or until the time limited by statute for so perfecting the judgment has expired.
2. A mere order for judgment is not appealable.

APPEAL from the Circuit Court for *Kenosha* County.

The facts are sufficiently stated in the opinion.

For the appellant the cause was submitted on briefs by *Henry Wiesmann.*

For the respondents there was a brief by *Quarles & Spence*, and oral argument by *Mr. Spence.*

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LYON, J. This appeal is from a judgment of the circuit court dismissing the plaintiff's complaint, with costs, for non-compliance with an order theretofore made in the cause requiring the plaintiff to file security for costs. The appeal was taken and perfected before the costs were taxed and inserted in the judgment. It was therefore prematurely taken, and must be dismissed. *Smith v. Hart*, 44 Wis. 230, and cases cited; *Haseltine v. Simpson*, 61 Wis. 427; *Hoye v. C. & N. W. R. Co.* 65 Wis. 243; *Ballou v. C. & N. W. R. Co.* 53 Wis. 150.

If the case is within the provisions of ch. 202, Laws of 1882 (which is not here determined), the same result follows, for the appeal was taken within less than sixty days after the finding of the court that the plaintiff was in default in respect to filing security for costs, upon which finding the judgment is predicated. Hence the time had not expired which the statute allows the prevailing party for perfecting his judgment. Until this was done, or, not being done, until the time for doing so had expired, the judgment was imperfect and not appealable. *Hoye v. C. & N. W. R. Co. supra.*

If the appeal be regarded as from an order for judgment, instead of a judgment (which seems to be the view taken of it by the counsel for the plaintiff), it must still be dismissed. A mere order for judgment is not appealable. See *Johannes v. Youngs*, 42 Wis. 401.

By the Court.— The appeal is dismissed.

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WILLIAMS, Respondent, vs. HAYES and others, Appellants.

February 2 — March 1, 1887.

Judgment: Correction and amendment: Res adjudicata: *Dismissal of complaint.*

1. After the term at which a judgment was rendered, and even after the expiration of a year after notice thereof, the circuit court may *correct* a mistake in the entry of the judgment, so as to make it conform to the judgment actually pronounced; but it cannot *modify* or amend the judgment to make it conform to what the court ought to have adjudged or intended to adjudge.
2. Whether a judgment simply dismissing the complaint in an equitable action is a bar to a future action or proceeding involving the same subject matter, is not determined. But when in the entry of such a judgment it is erroneously made to appear that the complaint was dismissed "upon the merits," the addition of such words is material, and they may be stricken out on motion.

APPEAL from the Circuit Court for *Racine* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This action was commenced by the plaintiff to set aside the proceedings of the defendants in laying out and opening a ditch through the plaintiff's land. The action was brought to a hearing in the circuit court in the March term, 1884. After the plaintiff had produced his evidence and rested his case, on motion of the defendants the circuit court ordered the complaint dismissed with costs. A motion was made by the plaintiff to set aside the order dismissing the action, and for a new trial. This motion was denied, and thereupon, on December 17, 1884, the clerk entered judgment in the action dismissing the action "upon its merits," with costs to the defendants. On April 6, 1885, the plaintiff appealed from the judgment to this court, and on September 1, 1885, the appeal was dismissed for want of prosecution, and no further steps were taken in the action until

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August 17, 1886, when the plaintiff, upon affidavits and the proceedings in the case, moved the circuit court to modify the original judgment entered in the case, December 17, 1884, "to conform to the order and decision of the court herein, and so that it may appear, as the truth is, that no judgment was ever rendered or ordered, or decision made, by the court herein upon the merits in this action." Upon the hearing of this motion the circuit court made the following order:

"[Title, etc.]

"The plaintiff having moved said court to correct the judgment heretofore entered in this action on the 18th day of December, 1884, so that it may appear thereby, as it was intended by the court that it should appear; the facts being that upon the close of the plaintiff's testimony the defendants moved the court for a nonsuit and to dismiss the plaintiff's complaint, and the court granted the defendants' motion to dismiss the complaint and made no findings in the case; and on the motion for a new trial an affidavit was filed by the defendants showing that a writ of *certiorari* had issued to review the proceedings of the defendants, and it being claimed that therefore a new trial should not be granted, and that view being considered by the court, the motion was denied, so that the judgment as rendered upon such dismissal should have been without prejudice to the plaintiff's proceedings at law to review the proceedings attacked by the complaint. Now, therefore, after hearing Messrs. W. C. Williams and W. J. Turner in support of the motion, and T. W. Spence, Esq., in opposition thereto, and having taken said motion under advisement, and being now advised thereon, so as to make said judgment correspond to the decision and determination of the court,

"ORDERED: That said judgment be corrected and amended and entered upon the records of this court so as to read as follows:

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"'CIRCUIT COURT, RACINE COUNTY.

"'*T. C. Williams, Plaintiff*, v. *A. B. Hayes, H. C. Williams, and O. L. Crabb, Defendants.*

"'This action having come on for trial at the March term of said court, and the testimony on the part of the plaintiff having been heard, and the court, Hon. A. SCOTT SLOAN, circuit judge, presiding, having, on motion of defendants' attorneys, ordered that the complaint of the plaintiff be dismissed because his remedy was at law and not by complaint in equity, and without prejudice to the right to proceed at law to review the proceedings set forth in the complaint in this action; and the plaintiff's motion to set aside the order of dismissal of the complaint having been denied: now, on motion of H. A. Cooper, Esq., defendants' attorney, it is adjudged that the plaintiff's complaint be dismissed, but without prejudice to the plaintiff's proceeding at law to review the proceedings described in the complaint in this action; and that said defendants do have and recover of the plaintiff their costs and disbursements herein taxed and allowed at the sum of one hundred and eleven dollars and 73-100 dollars.

"'*Racine, December 18, 1884.* F. W. BRUCE, Clerk.'

"And it is further ordered that this order be entered *nunc pro tunc* as of the 19th day of August, 1886.

"*Dated September 15, 1886.*

"By the court.

[Signed] "A. SCOTT SLOAN, Circuit Judge."

From this order the defendants appeal to this court.

For the appellants there was a brief by *H. A. Cooper* and *Quarles & Spence*, and oral argument by *Mr. Spence*. They contended, *inter alia*, that a former decree in equity between the same parties upon the same subject matter, which dismisses the bill, is a bar *unless expressed to be without prejudice*. Story's Eq. Jur. sec. 1523; Bigelow on Estoppel, 228,

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24 and note; Story's Eq. Pl. 793; *Durant v. Essex Co.* 7 Wall. 107; *Perine v. Dunn*, 4 Johns. Ch. 142; *Barker v. Belknap's Estate*, 39 Vt. 168; *Mickles v. Thayer*, 14 Allen, 114. A judgment dismissing a suit without any reserve for its renewal, *concludes* the parties. *Bledsoe v. Erwin*, 33 La. Ann. 615. Where the decision of the court, after examination of the pleadings and evidence, is entered on the docket "dismissed," without other words of qualification, such entry is conclusive of the merits of the case; and the court will deny a motion to amend the record by adding the words "without prejudice." 2 Daniel's Ch. Pr. 995, note 1; *Foote v. Gibbs*, 1 Gray, 412; *Bigelow v. Winsor*, id. 301; *Gove v. Lyford*, 44 N. H. 525; *Borrowscale v. Tuttle*, 5 Allen, 377.

For the respondent there was a brief by *W. C. Williams*, attorney, and *Gerrit T. Thorn*, of counsel, and oral argument by *Mr. Williams*. They argued, among other things, that if the record did not show the facts or grounds of dismissal the court had the *power* and it was *its duty* to amend or correct it. *Kempton v. Burgess*, 136 Mass. 192; *B. S. & M. Ass'n v. Boston*, 137 id. 186; *Foster v. "The Richard Busteed,"* 100 id. 412; *Wood v. Faut*, 55 Mich. 185; *Porter v. Wagner*, 36 Ohio St. 471. A court has power to modify a judgment dismissing a case absolutely, by amending it and making it without prejudice to the right to bring a new action, and a judgment dismissing a complaint may be subsequently amended so as to order a new trial instead of dismissal. It is within the *discretion* of the court, after the satisfaction of a judgment in favor of the plaintiff, to amend the complaint by adding a new cause of action, although by so doing the statute of limitations is avoided. *Loeschigk v. Addison*, 4 Abb. Pr. 210. See, also, *Giles v. Austin*, 34 N. Y. Super. Ct. 540; *Hatch v. Cent. Nat. Bank*, 78 N. Y. 487; *Crookes v. Maxwell*, 6 Blatch. 468; *Van Epps v. Van Deusen*, 4 Paige, 76; *Chamberlain v. Crane*, 4 N. H. 115.

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TAYLOR, J. The materiality of the amendment of the judgment arises out of the fact that the plaintiff, shortly after his equitable action was dismissed with costs, sued out a common-law writ of *certiorari* to review the proceedings of the defendants in laying out and opening said ditch through the plaintiff's lands, and the judgment as originally entered in this action is pleaded as a bar to the proceedings upon such writ. The learned counsel for the appellants contend that the circuit court had no authority to amend the judgment in the manner specified in said order. Among other reasons urged against the power of the court to make the order are the following: "(2) The judgment cannot be modified or corrected, after the term at which it was rendered, to add anything omitted by the court or to carry out his unexpressed intentions, but only to correct errors of the clerk in entering its judgment." "(5) If anything was omitted from the judgment by the clerk, it could only be supplied by motion within one year from notice of the judgment. (6) The order modifying and correcting the judgment is not warranted by the moving papers. The avowed object of the latter is to have the words 'upon the merits' expunged from the judgment. The order taken seeks to add to the judgment a new clause and condition. (7) The respondent has forfeited all right, if he ever had any, to a modification of the judgment, by laches."

We do not deem it necessary to cite authorities to show that the court has no authority to change its judgment, as pronounced by the court, after the term in which it was rendered. This is admitted by all parties. But it is urged by the respondent that the court may, after the lapse of the term at which judgment is rendered, correct any mistake made in the entry thereof which is in conflict with the judgment actually pronounced by the court. This latter proposition is fully sustained by the decisions of this court cited in the respondent's brief. *Wyman v. Buckstaff*, 24

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Wis. 477; *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 265, 268; *Durning v. Burkhardt*, 34 Wis. 585; *Quaw v. Lameraux*, 36 Wis. 626, 629; *Will of Cole*, 52 Wis. 591, 592. These cases fully establish the power of the circuit court to correct any mistake made in the actual entry of the judgment, which is in conflict with the judgment as pronounced by the court, and they also establish the rule that such mistake may be corrected after the expiration of a year after notice of the judgment rendered. Whether the party who prepared the judgment and caused the same to be entered by the clerk, could, on his motion, have such judgment corrected after the lapse of one year from the entry thereof, is a question not decided in this case. The evidence does not clearly show that the respondent had actual knowledge of the form of the judgment as entered by the clerk within one year after its entry. However that may be, he is not necessarily limited to the year within which to move to have the judgment corrected. We think it very clear that, upon the facts of the case, the circuit court had authority to hear the motion, and to grant such relief as the respondent was entitled to under the facts.

The learned counsel for the appellants insist that the judgment entered by the clerk was in conformity to the judgment as pronounced by the court, and therefore it was error to change it after the term at which it was entered had passed. After a careful reading of all the minutes of the reporter, of the clerk, and of the motion as made by the appellants, it appears to us very clear that the only judgment pronounced by the court, upon the motion of the appellants, was "that the complaint be dismissed with costs." The judgment entered by the clerk was that the complaint be dismissed "upon the merits," with costs to the defendants.

It is insisted by the learned counsel for the appellants that there is no difference in the law between a judgment

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dismissing the complaint with costs, and one dismissing the complaint "on the merits" with costs. If this proposition be good law, there could be no reasonable complaint as to the form of the judgment as entered by the clerk, and the judgment would be substantially the judgment pronounced by the court. After an examination of the authorities cited upon this point by the learned counsel for the respective parties we are not satisfied that a judgment simply dismissing the complaint in an equitable action is conclusive that the same was dismissed upon the merits, and is in all cases equivalent to a dismissal of the complaint upon the merits; and we are disposed to hold that the addition of the words "upon the merits" was a material addition to the judgment, and, if not directed to be so entered by the judge in pronouncing his judgment, the clerk had no authority to insert them in the judgment. There is at least so much uncertainty as to the conclusiveness of a judgment simply dismissing the complaint in an equitable action as a bar to a future action involving the same subject matter, that we are not disposed to determine the matter finally upon the motion made in this case. The effect of the judgment as a bar to further proceedings of the respondent in his *certiorari* proceedings must be determined in that action, when produced in evidence as a bar to that proceeding. The following authorities have a bearing upon that question: *Carter v. W., St. L. & P. R. Co.* 137 Mass. 187; *Kempton v. Burgess*, 136 Mass. 192; *Foye v. Patch*, 132 Mass. 105; *Burbank v. Woodward*, 124 Mass. 357; *Foster v. "The Richard Busteed,"* 100 Mass. 409, 412; *Perine v. Dunn*, 4 Johns. Ch. 140; *Holmes v. Remsen*, 7 Johns. Ch. 286; *Griswold v. Jackson*, 2 Edw. Ch. 461; *Lansing v. Russell*, 13 Barb. 510; *Mason's Ex'rs v. Alston*, 9 N. Y. 28; *People ex rel. Trainer v. Cooper*, 8 How. Pr. 288; *Bostwick v. Abbott*, 40 Barb. 331; *Burhans v. Van Zandt*, 7 N. Y. 525. See, also, the cases cited by the learned counsel for the appellants in their brief on this

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point. As the words added by the clerk in entering the judgment may change the conclusiveness of such judgment as a bar to the plaintiff in his subsequent proceedings, the entry was unauthorized, and was properly stricken out upon the motion of the respondent.

Upon an examination of the record and proceedings in this case had upon the trial, it seems plain to us that the only direction for judgment given or made by the court on the trial, after hearing the motion made by the defendants to dismiss the complaint, was that the complaint be dismissed with costs. This being so, it is entirely immaterial, for the purposes of the motion to correct the judgment entered, that the learned judge supposed he was directing a judgment dismissing the action without prejudice to the right of the plaintiff to bring another action, or that he intended to direct such a judgment. It would be unsafe to permit judgments to be changed in a substantial matter, years after the same are entered, upon the mere recollection of the judge that he intended to direct a different one from that which he expressly directed at the time, and we do not find any case which sanctions such proceeding. Such a modification of the judgment is not correcting the judgment as announced at the time, but it is making the judgment conform to what the court ought to have adjudged, or to what he intended to adjudge but failed to adjudge. Such a change in a judgment can only be made during the term in which it was entered. *Latimer v. Morrain*, 43 Wis. 107; *Selz v. First Nat. Bank*, 60 Wis. 246; *Schobacher v. Germantown F. M. Ins. Co.* 59 Wis. 86.

We are of the opinion that the court erred in modifying the judgment by stating in the order that it was dismissed "because his remedy was at law and not by complaint in equity," and without prejudice to the right to proceed at law to review the proceedings, and by inserting in the judgment itself the words, "but without prejudice to the

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plaintiff's proceeding at law to review the proceedings described in the complaint in this action." The only relief the court should have granted upon the motion of the plaintiff was to strike from the judgment the words "upon the merits." This would leave the judgment such as was ordered by the court at the time it was announced. Whether the judgment, as so corrected and modified, will be a bar to the proceedings of the plaintiff on his writ of *certiorari* is a question which is not directly involved on this appeal, and is not decided.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with directions to the circuit court to correct and modify the judgment by striking therefrom the words "upon the merits," as indicated in this opinion.

See note to this case in 32 N. W. Rep. 44.— REP.

STOEL, Executor, etc., Respondent, vs. FLANDERS and wife, Appellants.

February 2 — March 1, 1887.

Contract to maintain parents: Mortgage: Satisfaction: Condition precedent.

A mortgagee agreed with the mortgagors (her daughter and son-in-law), in consideration of their contract to support her and her husband in a specified manner during their natural lives, not to collect, receive, or ask for any further interest on the mortgage, *provided* the said mortgagors should perform the said contract. The agreement further stated that, *in case* the said mortgagors should perform their said contract according to the meaning and true spirit thereof during the natural lives of the mortgagee and her husband, she (the mortgagee) declared said mortgage "fully paid and satisfied and by these presents discharged of record." *Held*, that full and complete performance of the contract to support was a *condition precedent* to the satisfaction and discharge of the mortgage.

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APPEAL from the Circuit Court for *Walworth* County.

The facts will sufficiently appear from the opinion. The trial court held, as conclusions of law from the facts found, that the conditions precedent contained in the conditional release had never been performed, and that said release was of no effect; that the defendant *George F. Flanders* was indebted to the plaintiff, as executor, upon the note and mortgage, in the sum of $1,600, with interest from September 11, 1885; that said mortgage was a valid and subsisting lien; and that the plaintiff was entitled to judgment of foreclosure and sale. From the judgment entered accordingly the defendants appealed.

J. V. Quarles and *T. W. Spence*, of counsel, for the appellants, assigned as errors: (1) Directing judgment for the full amount of the mortgage; (2) directing judgment against the appellants without ascertaining the damages sustained by Mary Royce by reason of appellants' breach of their contract to support her; (3) not taking an account of the value of the support actually furnished to Lewis and Mary Royce under said contract; (4) not directing judgment on the findings in favor of the appellants; (5) construing the agreement as containing a technical condition precedent. They contended, *inter alia*, that the effect of the two written agreements made July 31, 1883, so far as the mortgage in suit is concerned, was that the mortgage should stand as security for the performance, and *indemnity* against nonperformance, of the obligations assumed by appellants; and that the liability to pay $1,600 in money was changed to a liability to support Lewis and Mary Royce during their lives, and was not different in its legal aspect than if Mary Royce had paid $1,600 in money in consideration of an agreement that she and her husband should be supported during their lives by the appellants, and the latter had given her a mortgage upon their farm to secure the performance of such agreement. The

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doctrine that upon the breach of an agreement to support, the injured party can proceed by action at once as though the agreement had not been made, and that upon such breach there is an entire forfeiture of the consideration for such support, and that such consideration can be recovered in a direct action for that purpose, is denied in *Bogie v. Bogie*, 41 Wis. 217. See, also, *Bresnahan v. Bresnahan*, 46 id. 385; *Bishop v. Aldrich*, 48 id. 619; *Blake v. Blake*, 56 id. 392. To avail herself of the right to have the contract rescinded and have the benefit of the mortgage security, after part performance, the plaintiff should have brought an equitable action setting up the contract for support and its breach, and praying for rescission of the agreement, an *accounting* between the parties, and the foreclosure of the mortgage and sale of the premises to satisfy the value of the support found due. See *Van Trott v. Wiese*, 36 Wis. 449; *Gould v. Cayuga Co. Nat. Bank*, 86 N. Y. 83; *S. C.* 99 id. 337. But even though the action had been brought in that form, still the court should not have decreed a rescission, because it would be impossible to place the parties in *statu quo*, and because complete compensation in damages could readily be given. One party cannot rescind a contract for a failure of the other party which is but partial, having had performance of a distinct part as a subsisting and executed consideration, but must seek his remedy in damages. 2 Parsons on Con. 697, note *g;* 2 Sutherland on Dam. 245, 246; *Burge v. C. R. & M. R. Co.* 32 Iowa, 101; *Miller v. Cotten*, 5 Ga. 341. Again, rescission should have been neither decreed nor allowed, because there was no breach of the contract for support. There was nothing in such contract to bind the appellants to furnish to Lewis or Mary Royce a home *with them*. If Mr. and Mrs. Royce were dissatisfied with the accommodations at appellants' house, they were at liberty to obtain rooms and board elsewhere and ask appel-

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lants to pay for the same. If appellants refused to pay, or insisted that unless they accept these provisions at their home they would not furnish them at all, there would have been a breach of the contract. But there was no such evidence or finding. It is admitted by the finding that comfortable rooms and good board were furnished. And the appellants cannot be charged with failure to perform the contract because of ill-usage, when the old people never requested a change of location where they would not be subject to the ill-treatment complained of. The right to rescind a contract is in every case *strictissimi juris.* 2 Parsons on Con. 526, 501, note *y*. Again, the agreement in this case is not unlike the one in *Peterson v. Olson*, 47 Wis. 122, and the amount of recovery should be limited to the value of the things not furnished. See 2 Greenl. Cruise, 80; 1 Jones on Mortg. sec. 388; *Fay v. Guynon*, 131 Mass. 31; *Amos v. Oakley*, id. 413; *Schell v. Plumb*, 55 N. Y. 592; *Parker v. Russell*, 133 Mass. 74; *Furbish v. Sears*, 2 Clifford, 454; *Hawkins v. Clermont*, 15 Mich. 511; *Hoyt v. Bradley*, 27 Me. 242; *Austin v. Austin*, 9 Vt. 420. On the foreclosure of a mortgage which stands as security for such a contract, the damages will not be the penal sum of the mortgage, but only what the injured party suffers by the breach. 1 Jones on Mortg. sec. 393, note 5; *Ferguson v. Kimball*, 3 Barb. Ch. 619; *Fiske v. Fiske*, 20 Pick. 499; *Wright v. Wright*, 49 Mich. 624; *Bresnahan v. Bresnahan*, 46 Wis. 385. The fact that the mortgage foreclosed in this action was given for moneys theretofore advanced to the parties, does not affect its character as indemnity against damage by a failure of the subsequent agreement to support. Again, conceding that the action was properly brought, that the contract was entire and subject to rescission, that the court might have put the parties in *statu quo*, and that appellants cannot have any advantage under the contract, they must still be held entitled to credit for what they have done

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under the contract; and the mortgagees are not entitled to confiscate all they have received under it. *Burnham v. Mitchell*, 34 Wis. 117. In this case the court held the condition to be a condition precedent and applied the same rigid rule that would obtain in an action at law brought by the appellants on the contract. But the condition was manifestly inserted as security for performance, and should receive the same construction as other security clauses, which are universally held to be conditions subsequent. And the plaintiff, having come into a court of equity, must *do equity*.

For the respondent there was a brief signed by *Dodge & Fish*, of counsel, and the cause was argued orally by *Mr. Dodge* and *Mr. T. M. Kearney*. To the point that entire and strict performance of all the conditions precedent was essential to the acquisition of any rights under the agreement, they cited 4 Kent's Comm. (12th ed.), 125; 2 Washb. R. P. 8; *Nevius v. Gourley*, 95 Ill. 206; *Brannan v. Mes'ck*, 10 Cal. 95; *Vanhorne's Lessee v. Dorrance*, 2 Dal. 304, 317. The acts found by the court constituted a breach of the conditions. *Bogie v. Bogie*, 41 Wis. 209; *Tracey v. Sacket*, 1 Ohio St. 54; *Oard v. Oard*, 59 Ill. 46; *Frazier v. Miller*, 16 id. 49–50.

Orton, J. The complaint in this case is in the usual form for foreclosure of a mortgage. The note for $1,600, and the mortgage collateral thereto, bear date July 2, 1881, and were given to Mary Royce by *George F. Flanders* and *Ione A. Flanders*, his wife, the appellants. The suit was brought by Mary Royce, and she having died, it was revived in the name of the respondent, her executor. It is stated in the answer that the said *Ione A. Flanders* was the daughter and only child of the said Lewis and Mary Royce, and that they being well advanced in years, and desirous of avoiding the cares and responsibilities of active life, and at the same time to secure to the said *Ione* what-

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ever should remain of their property after providing for their support, the said *George F.* and *Ione A. Flanders* executed and delivered to them the following agreement, viz.:

"This agreement, made and entered into this 31st day of July, 1883, between *George F. Flanders* and *Ione A. Flanders* of the first part, and Lewis Royce and Mary Royce of the second part, witnesseth, that for and in consideration of money, lands, and tenements heretofore conveyed, the said *George F. Flanders* and *Ione A. Flanders* shall maintain the said Lewis Royce and Mary Royce for and during their natural lives; that is to say, said parties of the first part are to furnish good and comfortable room or rooms, good and comfortable board, do their sewing and washing, take care of them when sick.

[Signed] "GEORGE F. FLANDERS.
"IONE A. FLANDERS."

It is further alleged in said answer that, at the same time, and as part and parcel of said agreement, the said Mary Royce, for the consideration aforesaid, made and delivered to *George F.* and *Ione A. Flanders*, the following agreement, to wit:

"Know all men by these presents, that I, Mary Royce, of Burlington, in consideration of a contract made and entered into on this day by *George F. Flanders* and *Ione A. Flanders*, to support and maintain the said Mary Royce and Lewis Royce during their natural lives, do hereby declare that I have agreed with the aforesaid *George F. Flanders* and *Ione A. Flanders* not to collect, receive, or ask for any further interest on a certain mortgage, executed by *George F. Flanders* and *Ione A. Flanders* on the 2d day of July, 1881, and recorded July 6, 1881, at 5 o'clock P. M., in vol. 47 of Mortgages, page 590; *provided*, that the said *George F. Flanders* and *Ione A. Flanders* shall perform on their part the contract referred to and before mentioned; *and in case*

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that the said *George F. Flanders* and *Ione A. Flanders* shall perform the said contract according to the meaning and true spirit thereof, during the natural lives of said Mary Royce and Lewis Royce, I, Mary Royce, do declare said mortgage fully paid and satisfied, and by these presents discharged of record.

"In witness whereof I have hereunto set my hand and seal this 31st day of July, A. D. 1883.

[Signed] "MARY ROYCE. [Seal.]

"In presence of

"L. B. COLTON.

"J. B. WHEELER."

It is also alleged that the mortgage referred to is the same as the one in suit, and that the appellants have in all respects kept and performed the conditions of said agreement up to the 10th day of September, 1885, when the said Mary Royce refused to accept their further care and support, and that they are ready and willing and offer to perform the contract if the said Mary Royce will accept the same, and that they maintained the said Lewis Royce until he died, July 23, 1884, and the prayer is that the action may be dismissed.

The plaintiff, in reply, admitted the execution of said agreements, and alleged that the said defendants have neglected and entirely failed to keep said agreements on their part, by neglecting and failing to furnish the plaintiff, Mary Royce, with comfortable room or rooms, and with good and comfortable board, and by neglecting to take proper care of her, and misusing and ill-treating her in various ways, and that the condition upon which said release was given has not been complied with and is therefore of no force or effect. The evidence upon the trial has not been made part of the record.

The circuit court found "that, from and after the execution of said agreement for maintenance and said conditional

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satisfaction, up to the death of said Lewis Royce, to wit, the 23d day of July, 1884, the said defendants did keep and perform their said agreement by maintaining and providing for said Lewis Royce and Mary Royce in manner and form as required by said contract; that from the 23d day of July, 1884, down to the 10th day of September, 1885, said Mary Royce lived and received her support at the house of the defendants, at which time said Mary Royce left such house permanently by reason of the facts set forth in seventh [following] finding, and that she was prevented from leaving prior to that time by the acts of the defendants in confining her as set forth in said seventh [and following] finding." "*Seventh.* That the defendants have failed and neglected to perform the contract referred to in said conditional discharge, according to the meaning and true spirit thereof, in that said defendants did ill-treat and abuse the said decedent, Mary Royce, both by application of personal violence and coercion, and by confining and imprisoning her and depriving her of her personal liberty without any sufficient reason, justification, or excuse, and did thereby render the continued residence of the said Mary Royce with them uncomfortable, and her life with them unendurable; whereby said Mary Royce was compelled to and did make her escape and depart from the residence of the defendants on the 10th day of September, 1885."

It is to be presumed that the evidence most fully justified these findings, and the case must be decided upon the findings and the pleadings alone, as the evidence is not before us. The two contracts (and we may as well call them contracts, without any more technical designation) were very informally and inartistically drawn, but their true meaning and construction are not at all difficult; and for authority upon all the material questions raised we need not necessarily look outside cases decided by this court.

The first agreement to maintain in the manner specified

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Lewis Royce and his wife, Mary, during their natural lives, was based solely, so far as appears therein, upon the consideration fully executed and satisfied of money, lands, and tenements, paid and conveyed by Lewis Royce and his wife, or by one of them, to the defendants, and such consideration may be presumed to have been liberal and ample, and to the extent of all the property and means of at least Lewis Royce; for it does not appear that upon his death he left any estate to be administered. Such a disposition of their property was probably prompted by their natural love and affection for, and implicit confidence in, their daughter and only child, *Ione A. Flanders*, as well as by their desire to secure their permanent and comfortable support and maintenance during the remainder of their lives, without anxiety, toil, or care, in the home of their child, whose natural love and affection would be their best security. In the construction of such contracts, "according to the meaning and true spirit thereof," these natural relations of the parties must be considered and have much weight. "Conveyances of property by aged and infirm people to their children, in consideration of promised support and maintenance, are somewhat peculiar in their character and incidents, and must sometimes be dealt with by the courts on principles not applicable to ordinary conveyances," said Mr. Justice LYON, in *Bogie v. Bogie*, 41 Wis. 209. See, also, *Tracey v. Sacket*, 1 Ohio St. 54; *Oard v. Oard*, 59 Ill. 46; *Frazier v. Miller*, 16 Ill. 49. There can be no question but that the desire of the parents to secure for the remainder of their lives a permanent and comfortable home with their daughter and her husband, whose natural affection would be likely to prompt them to care and kindness and gentle treatment in their old age, was one of the main inducements for the conveyance of their property and of their entering into this contract.

It seems that Mary Royce, the mother, still retains some individual and private means of support in this mortgage

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now in suit, given to her in 1881. This mortgage forms the subject of the second contract, between herself alone and *George F. Flanders* and *Ione A. Flanders*. It is most clearly a separate and independent contract, in which Lewis Royce had no interest except as a mere beneficiary. It refers to the first contract only for the consideration and conditions, and the first contract makes no reference whatever to this contract. Its being of the same date has no significance whatever; for it would have the same meaning and effect if made at any other time subsequent to the first contract. The first contract was perfect and complete and an entirety in itself; and so of this contract, except by its mere reference to the first for its consideration and conditions, which might as well have been embodied in it.

We now have sufficiently the nature of these transactions to determine the main and ably contested question in the case, which is whether the condition of the maintenance and support of Lewis and Mary Royce during their natural lives in the manner specified, and of the performance of said first contract according to the meaning and true spirit thereof, is precedent or subsequent to the satisfaction and discharge of said mortgage. We do not think that this question is at all difficult. It is most unquestionably a condition precedent.

1. The defendants so treat it in their answer. They admit the condition, and aver performance, or willingness and readiness to perform, and they do not claim any compensation or apportionment of damages for part performance. They do not aver any delivery to them of the note and mortgage or either of them, and they ask no judgment for such delivery or for the satisfaction and discharge of the mortgage, or any judgment except the dismissal of the action. There is the usual prayer for general relief, but no facts are stated which entitle them to any other relief than a dismissal of the action. They are willing to leave the

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mortgage in the possession of Mary Royce as her property until they do fully perform their contract, by offering to so perform if Mary Royce "will accept the same," and they do not ask for the satisfaction and discharge of the mortgage until they do fully and finally perform by supporting and maintaining her during the remainder of her natural life in the manner specified in the contract. The answer is only consistent with full payment or no payment of the mortgage, by not pleading part payment or part performance, and by averring that there has been no breach of the contract on their part and that there has been a breach on her part by her refusal to accept their further care and support. They rest their case upon full performance, or what is equivalent to full performance, as a condition precedent to their right to a satisfaction and discharge of the mortgage.

2. The facts and circumstances attending the making of this last contract show a design to make a full performance of the first contract a condition precedent to the satisfaction and discharge. Lewis and Mary Royce had parted with their money and conveyed their lands and tenements to the defendants, and the full title thereto had become vested in them upon condition subsequent or without condition, and their security therein for the performance of the contract was lost. Mary Royce held this mortgage against the defendants as her only resource against absolute want or dependence. She voluntarily, so far as it appears, made this contract with the defendants, as an additional and interested motive and inducement for them to perform their contract, and retained the mortgage as her only security that they should do so. If, as claimed by the learned counsel of the appellants in this court, the right to the satisfaction and discharge of the mortgage had become vested upon a condition subsequent, then what was the use of such a condition, so far as any security to Mary Royce was concerned, after the mortgage had been paid, satisfied, and discharged?

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The fact of Mary Royce holding this mortgage, probably for money loaned, shows that she was a woman capable of doing her own business, and it would not be consistent with her possession of common sense to make this condition of maintenance and support of herself and husband other than a condition precedent to the satisfaction and discharge of the mortgage.

3. The language of the contract itself makes it a condition precedent. Mary Royce agrees "not to collect, receive, or ask for any further interest on the mortgage, *provided* that they shall perform on their part the contract referred to," which clearly means so long as they shall perform. The performance is most clearly a condition precedent to the agreement not to collect, receive, or ask for the interest. Then the language is, "*and in case* that the said *George F. Flanders* and *Ione A. Flanders* shall perform the said contract," etc., "I, Mary Royce, do declare said mortgage fully paid," etc. This language implies the performance of the contract before the satisfaction of the mortgage, and this, together with the fact that the estate or property has not become vested in the person whose prior duty it is to perform the condition, are the invariable tests of a condition precedent, and in such a case the performance of the act agreed to be done must precede the taking effect of the dependent contract for any purpose. A person has the right to make his contract so as to make his receiving any benefit whatever from it depend upon his own previous performance of some act, and neither the courts of law or equity can relieve him from this position any more than they can make contracts for the parties. "Conditions precedent are such as must be punctually performed before the estate can vest." Wood's Inst. 235; *Rogan v. Walker*, 1 Wis. 527. When one party has omitted to perform any act which constituted the consideration of the other party's undertaking, or any part of it, and which was to precede

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in order of time the performance of the other party, the decisions are uniform that no recovery can be had upon the contract. *Kellogg v. Nelson*, 5 Wis. 125. In that case there had been part performance, and some of the wheat delivered, without requiring the other party to furnish the bags to carry it in, which was held to be the condition precedent to the delivery. This case shows how strict must be the performance of a condition precedent before any recovery can be asked.

In *Warren v. Bean*, 6 Wis. 120, the parties had made up an issue by the pleadings of performance of the condition precedent, which was not sustained, but the trial court had allowed evidence of performance of the work beyond the time mentioned in the contract, and of enlargement of the time, and of an acceptance of the work. It was held that this was error, and that, on the pleadings, full performance within the time was required. The performance of the condition precedent is required before any performance by the other party can be demanded. *Martin v. Veeder*, 20 Wis. 466.

In *Hudson v. McCartney*, 33 Wis. 331, payments for the work were to be made only when the same was done to the full and complete satisfaction of the superintendent, and upon his certificates. It was held that the plaintiff could not recover without the performance of this condition precedent, even if he had done the work according to the contract in other respects. In the able brief of Messrs. Hastings and Greene in that case, the English, and many American, authorities are collated to the point that a condition precedent must be fully performed before the dependent obligation or agreement can have any effect whatever, and such is the discussion in *Redman v. Ætna Ins. Co.* 49 Wis. 438.

In *Drew v. Baldwin*, 48 Wis. 529, the distinction is well and clearly made that a condition *precedent* must be per-

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formed before the estate can vest, and, because in that case the estate was conveyed and vested at once and before the condition was to be performed, it was held to be a condition subsequent, and that such was the intention of the parties. See, also, the authorities in the brief of the learned counsel of the respondent. The authorities are uniform in support of the nature and effect of a condition precedent as above laid down.

The learned counsel of the appellants complain that such a rule is arbitrary and harsh, and in many cases may work great injustice. If so, it is the fault of the party who assumes by his contract the strict and full performance of the condition before the undertaking or obligation of the other party shall take effect or have any force whatever. The only remedy or avoidance of the injustice complained of is that the party must not make such a contract, the legal effect of which he is presumed to have known. In view of all the authorities, there can be no doubt that the defendants were bound to the support and maintenance of Lewis and Mary Royce during their natural lives in the manner specified, before they can insist upon the satisfaction or discharge of the mortgage or any part thereof. The agreement of Mary Royce, that she would not collect, receive, or ask for any interest upon the mortgage only while the condition was being strictly performed, conclusively shows that the mortgage not only remained, but should remain, the property of Mary Royce until the full and complete performance of the condition, or until lawfully excused from such performance. I need not specially notice the authorities cited by the learned counsel of the appellants on this point, for they were all cases of condition *subsequent*, and not applicable. In such cases it may be that the claims, for the first time asserted in this court in this case, that the defendants should in equity be allowed a proportionate compensation for their part performance, and that the actual

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damages for the breach of the condition should be ascertained, may be considered, for such conditions are not favored in the law, and are construed strictly, because they tend to destroy estates already vested. *Drew v. Baldwin, supra.* But such claims have no place in such a case as this is, upon the facts found and conclusions of law, or upon the pleadings.

Finally, there is no chance for doubt or hesitation in holding in this case that the defendants not only failed to perform the condition but placed themselves, by their most wicked and unnatural conduct and cruelty towards Mary Royce, in such an attitude towards her that neither law nor humanity would allow them to attempt any longer to support and maintain her in the house and home of her daughter, where, under the contract, she had a right to remain. They most signally violated their contract, both in letter and spirit, by a course of treatment so cruel and inhuman as to shock the sensibilities of mankind. "They *ill-treated* and *abused* her, both by the application of *personal violence* and *coercion*, and by *confining* and *imprisoning* her and depriving her of *personal liberty* without any sufficient reason, justification, or excuse, and thereby rendered her continued residence with them *uncomfortable*, and her life with them *unendurable*, whereby she was compelled to and did make her *escape* and depart from their residence." The defendants, by their answer, allege that Mary Royce refused to accept their further *care* and *support*, and they tender her a further performance of their contract if she will accept the same. This comes very near "adding insult to injury." The finding of the court on this subject is a *verity* in the case, and cannot be questioned. They now ask in this court, by their learned counsel, that they be compensated, on principles of *equity*, for the support and maintenance already rendered (and for *such* support and care). The engagement of able and distinguished counsel in their behalf

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was properly due to the presumption of innocence, and their valuable services have been consistent with the safeguards which the law throws around even the guilty; but, having done their full duty, they were unable to excuse or palliate such atrocious conduct, or to show that by it the defendants had not violated the condition *precedent* to their having any interest in the mortgage except to *pay* it. It is very unpleasant to the courts, as well as to the counsel, to be compelled to pass upon such a record of infamous conduct, and it is to be hoped that such a case of cruelty by a child towards an aged mother may never again occur.

By the Court.—The judgment of the circuit court is affirmed.

KLIX, Administrator, etc., Appellant, vs. NIEMAN, Respondent.

February 3 — March 1, 1887.

Negligence: Unguarded excavation: Death of child.

The owner of a city lot is not bound to fence or guard an excavation or pond therein not situated so near the street as to make it unsafe for persons passing, and is not liable in damages for the death of a boy who, while playing about such excavation or pond, falls therein and is drowned.

APPEAL from the Circuit Court for *Milwaukee* County.

Action to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the defendant's negligence. The allegations of the complaint are sufficiently stated in the opinion. The plaintiff appeals from an order sustaining a general demurrer.

For the appellant the cause was submitted on the brief of *J. Coleman.* He contended that the owners of land are

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liable for injuries resulting to *children*, although trespassing at the time, when from the peculiar nature and open and exposed position of the dangerous defect or agent, the owner should reasonably anticipate such an injury. 1 Thomp. on Neg. 304, 305. And the question of such negligence or liability is one for the jury. 2 Thomp. on Neg. 1140; *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332; *Birge v. Gardiner*, 19 Conn. 507; *Kerr v. Forgue*, 54 Ill. 482; *Koons v. St. L. & I. M. R. Co.* 65 Mo. 592; *Keffe v. M. & St. P. R. Co.* 21 Minn. 207; *Lovett v. S. & S. D. R. Co.* 9 Allen, 557; *Lynch v. Smith*, 104 Mass. 52; *Karr v. Parks*, 40 Cal. 188; *Robinson v. Cone*, 22 Vt. 213; *Drew v. Sixth Ave. R. Co.* 26 N. Y. 49; *Oldfield v. N. Y. & H. R. Co.* 14 id. 310; *Cosgrove v. Ogden*, 49 id. 255; *Barksdull v. N. O. & C. R. Co.* 23 La. Ann. 180; *Railway Co. v. Stout*, 17 Wall. 657; *S. C.* 2 Dill. 294; *Ewen v. C. & N. W. R. Co.* 38 Wis. 613.

For the respondent there was a brief by *Johnson, Rietbrock & Halsey*, and oral argument by *Mr. Johnson*. They argued that the owner of land is not bound to fence or guard an excavation or depression, pond or pool which he did not make or cause to be made upon his land, for the benefit of strangers, young or old, who had no right to go upon the land. Nor is such owner liable for injuries occasioned by an excavation made by himself upon his own land unless it be so near a public or private way as to interfere with the safety of persons lawfully using the way. 1 Thomp. on Neg. 361; Shearm. & Redf. on Neg. sec. 505; *Blyth v. Topham*, Cro. Jac. 158; *Deane v. Clayton*, 7 Taunt. 532; *Hardcastle v. S. Y. R. Co.* 4 Hurl. & N. 67; *Binks v. Same*, 113 Eng. C. L. 244; *Barnes v. Ward*, 9 C. B. 392; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Corby v. Hill*, 4 C. B. N. S. 556; *Hounsell v. Smyth*, 7 id. 730; *Beck v. Carter*, 68 N. Y. 283, 289; *Kohn v. Lovett*, 44 Ga. 251; *Howland v. Vincent*, 10 Met. 371; *Gramlich v. Wurst*, 86 Pa. St. 74.

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COLE, C. J. We think the demurrer in this case was properly sustained, for the reason that the complaint shows no actionable negligence on the part of the defendant. The complaint states that the defendant was the owner of and in the possession of a lot in the city of Milwaukee, situated on the northeast corner of Hubbard and Lloyd streets; that the lot was in a thickly settled and populous part of the city, and was not inclosed by fence either in front thereof between it and Hubbard street, or on the side between it and Lloyd street, but that the lot was vacant and open, so that the public had free and unobstructed access thereto from both Hubbard and Lloyd streets; that for a long time prior to the 5th of September, 1885, there had been upon the lot a deep and dangerous hole or excavation, partially filled with water, making a pond which covered about the entire surface; that the water of the pond was roily, so that its depth could not be ascertained except by measurement, but that in places it was of the depth of nine feet, so that the pond was dangerous to the lives of children who might be attracted thereto for amusement or otherwise; that the defendant, well knowing that the pond was dangerous to the lives of children residing in the vicinity of the same, wrongfully, negligently, and carelessly permitted it to remain unguarded by fence or barricade, and the plaintiff's son, a lad about nine years of age, "while playing upon and about said pond of water, being induced thereto by reason of the unguarded and unprotected condition of said hole as aforesaid, fell and was precipitated into the same and was drowned."

It will be observed that it is not alleged that the pond was so near the highway as to make it unsafe for passengers going along the street or sidewalk; and no averment that the boy when he fell into the pond was passing along the street or sidewalk. On the contrary, it is stated that the boy was playing upon and around the pond when he was

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precipitated into the water and drowned. So the single question presented is, Was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made or caused to be made) where surface water collected, in order to secure the safety of strangers, young or old, who might go upon or about the pond for play or curiosity?

If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises, for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold. A learned author states the doctrine in these words: "An owner of land is under no obligation to fence an excavation on his land, unless it is so near the highway as to amount to a public nuisance; and if persons or animals are killed or injured in consequence of his failing to do so, no damages can be recovered. A qualification of this rule is that when the owner of land, expressly or by implication, invites a person to come upon it, he will be liable for damages if he permit anything in the nature of a snare to exist thereon which results in injury to such person, the latter being at the time in the exercise of ordinary care. If, however, he gives a bare license or permission to cross his premises, the licensee takes the risk of accidents in using the premises in the condition in which they are." 1 Thomp. Neg. 361. Among other authorities cited by the author to sustain this doctrine of the text is *Hardcastle v. South Yorkshire R. Co.* 4 Hurl. & N. 67, where Pollock, C. B., uses this language: "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step or

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being affected with sudden giddiness, or, in the case of a horse or carriage way, might, by a sudden starting of the horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road in a dark night, and losing his way, may wander to any extent; and if the question be for the jury no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise,— if in every case it was to be left as a fact to the jury whether the excavation was sufficiently near to the highway to be dangerous." Pages 74, 75. See *Hounsell v. Smyth*, 7 C. B. (N. S.), 731.

This question is very fully discussed in *Hargreaves v. Deacon*, 25 Mich. 1, and *Gramlich v. Wurst*, 86 Pa. St. 74. In *Hargreaves v. Deacon*, the plaintiff, as administrator, sought to recover damages for the death of a son, a child of tender years, who was killed by falling into a cistern which had been left uncovered on premises not immediately adjoining the highway. After a learned and able examination of many cases, Mr. Justice CAMPBELL finds no support to any doctrine which would authorize a recovery. The cistern, he says, "was made, as is customary, with its top substantially on a level with the earth around it, and as is usual where reservoirs, vaults, sewer openings, and the like are made where there is much occasion for passage, and where an elevation might be inconvenient. Such openings require for safety a cover which will bear such pressure as is likely to be brought upon it and keep passengers from

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falling in. If in a highway or sidewalk, the duty of protection extends to all persons who have a legal right to go there, or, in other words, to the whole public, and it depends on that right. If on private property, not open of right to the public, it applies less generally, and only to those who have a legal right to be there and to claim the care of the occupant for their security, while on the premises, against negligence, or to those who are directly injured by some positive act involving more than passive negligence. Cases are quite numerous in which the same questions have arisen which arise in this case; and we have found none which hold that an accident from negligence, on private premises, can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience in no way connected with business or other relations with the occupant."

There is a class of cases which hold the proprietor liable for injuries resulting to children from dangerous machinery left unguarded and so exposed as to be calculated to attract their interference with it. *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. M. & St. P. R. Co.* 21 Minn. 207; and *Koons v. St. L. & I. M. Railway*, 65 Mo. 592, are of that character. In *Hydraulic Works Co. v. Orr*, 83 Pa. St. 332, the platform which caused the injury was upon a private passage or cart-way adjoining a factory; and in *Birge v. Gardiner*, 19 Conn. 507, the gate was on or near the line of the lane or public pass way. In this case the plaintiff recovered, but a new trial was ordered on the ground of misdi-

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rection of the court, there being evidence of contributory negligence. In *Kerr v. Forgue*, 54 Ill. 482, the counters and barrels were placed on the sidewalk on a public street in a "tottering condition" and occupied a considerable portion of the walk. The court held that the negligence of the defendant in placing obstructions upon the sidewalk and permitting them to remain there for some weeks, "was much greater than the carelessness of the boy," and affirmed the judgment which awarded damages for the injury.

The rule that holds persons responsible for injuries caused by spring guns, man-traps, etc., is familiar and well settled; but it has no application here. Unless we hold that the defendant was under a legal obligation to fence this pond for the protection of children reaching and playing upon it, there can be no recovery. And it is obvious that a fence would have to be very high and very tight to afford any effectual guard against children having access to the pond. But upon the facts, we do not think the law imposed the duty upon the defendant of building a fence or guard to prevent children from reaching the pond; therefore he is not liable for the death of the child.

By the Court.—The order of the circuit court sustaining the demurrer is affirmed.

See note to this case in 32 N. W. Rep. 223.—REP.

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WINNER, Respondent, vs. HOYT, imp., Appellant, and others, Garnishees, etc.

WINNER, Respondent, vs. HOYT and another, Garnishees, etc., Appellants.

February 3 — March 1, 1887.

GARNISHMENT. *(1) Service on principal defendant: Jurisdiction. (2) Service on one partner only. (3) Diligence in finding defendant.*

1. The service of the garnishee summons upon the principal defendant under sec. 2756, R. S., is not a prerequisite of jurisdiction, but is merely a *notice* in a proceeding *in rem*, jurisdiction of the *res* being acquired by service upon the garnishee.
2. Where the garnishment is in aid of execution upon a judgment against partners, both of whom appeared in the principal action, and where the property sought to be reached had been assigned to the garnishee by the firm, service of the garnishee summons upon one partner is sufficient to prevent the service upon the garnishee from becoming void and of no effect.
3. Where a garnishee summons has been placed in the hands of the sheriff of the county where the principal defendant resides, and the sheriff is unable, after due diligence, to find such defendant in the county, and ascertains that he has no usual place of abode with any family or person, and is informed that he has left the county to be absent traveling until after the time limited for the service of such summons has expired, and is unable, after due diligence, to ascertain where he could be found at any particular time within the period so limited, so that service could be made on him at that place, such sheriff is justified in returning that after due diligence service could not be made on such defendant within the state.

APPEALS from the County Court of *Milwaukee* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

May 28, 1885, the plaintiff, in an action commenced by summons and attachment personally served on both defendants, April 23 and 29, 1885, upon a debt accruing prior to April 16, 1885, recovered judgment for $2,203.18 against

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the firm composed of said defendants *E. S. Hoyt* and Wesley Kinney, in the county court for Milwaukee county. May 11, 1885, the defendants, *E. S. Hoyt* and Kinney, by S. M. Dixon, as their attorney, appeared in said action and traversed said attachment, which traverse was dropped and abandoned by consent of all parties. An *alias* execution was issued upon the judgment, and August 6 and 7, 1885, the garnishee summons and affidavit were served by the sheriff upon the defendant Kinney, and also upon the garnishees, *Frank M. Hoyt* and *Ephraim Mariner*. The sheriff, August 12, 1885, returned: "The defendant *E. S. Hoyt* could not, after using due diligence, search, and inquiry, be found in my county." August 27, 1885, *Frank M. Hoyt*, as such garnishee, answered denying all indebtedness and liability to said firm or having in his hands any property belonging to the firm. August 31, 1885, the plaintiff took issue with such answer of the garnishee. November 16, 1885, the cause was tried, and thereupon the trial court found in favor of the garnishee, and November 28, 1885, and on motion of *Ephraim Mariner* and *Frank M. Hoyt*, attorneys for defendants therein, judgment was entered against the plaintiff and in favor of the garnishee, dismissing the action with costs against the plaintiff. From that judgment the plaintiff appealed to this court, and May 15, 1886, the judgment was reversed, and the cause was "remanded for further proceedings according to law." 66 Wis. 227, 251.

July 19, 1886, the *remittitur* was filed in the trial court, and thereupon the plaintiff moved for judgment against the garnishee *Frank M. Hoyt*. September 10, 1886, the said *E. S. Hoyt*, who appeared in the case for that purpose only, upon the papers and proceedings on file and of record in the action, and upon certain affidavits, obtained an order to show cause why the service of the garnishee summons and affidavit therein should not be vacated and set aside and held and declared to be void from the beginning. The court denied

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the motion October 30, 1886, and from the order denying the same the said *E. S. Hoyt* has taken one of these appeals.

On the same October 30, 1886, in pursuance of an order to show cause previously made and based upon the records and proceedings in said principal action and said action against said garnishees, it was ordered, in effect, that leave be, and the same was thereby, granted to the deputy sheriff who served and returned said summons in garnishment to amend his return of such service thereon by adding to such return the statement that, after due diligence, service of the said summons could not be made upon the said defendant *E. S. Hoyt* within the state of Wisconsin. From that order the garnishees, *Mariner* and *Frank M. Hoyt*, have taken one of these appeals.

The facts appearing in the papers and records upon which said orders so appealed from (or one of them) were based, in addition to those already stated, were, in effect, that the debt upon which said judgment was recovered was contracted by the firm and copartnership composed of said *E. S. Hoyt* and Wesley Kinney, and in the course of their partnership business; that, from the time the property of said firm was transferred to *Frank M. Hoyt* in April, 1885, to about August 6, 1885, said *E. S. Hoyt* was employed by the said *Frank M. Hoyt* in collecting old accounts of said firm in different parts of the country; that said traverse was never filed, nor any notice of retainer or appearance by said Dixon was ever served on the plaintiff's attorney or entered in the clerk's office; that said *Frank M. Hoyt* and said *Mariner* acted as attorneys in the principal action, and the judgment was entered therein upon their motion; that said Dixon did not act as such attorney except in making said answer of traverse, but the said *Frank M. Hoyt* had charge of the litigation; that shortly after May 22, 1885, it was verbally stipulated on the part of the plaintiff and said *Frank M. Hoyt*, in effect, that said traverse be considered

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withdrawn and the attachment issued therein dismissed, and that judgment be entered therein at once by default, which was carried into effect; that from August 7, 1885, to December 31, 1885, inclusive, the said *E. S. Hoyt* was in the state of Wisconsin; that from June 1, 1885, to August 20, 1886, inclusive, his business was that of a traveling agent, spending most of his time in making trips from place to place in the country outside of Milwaukee county in taking orders for merchandise and making collections for goods sold by Webster Bros., liquor dealers at No. 216 West Water street in the city of Milwaukee; that before starting upon such trips he always agreed with his employers upon the route to be taken, and fixed approximately the dates he would be at the various stopping places upon the way; that said *E. S. Hoyt's* duties as such traveling agent kept him nearly all the time in the interior of the state, outside of Milwaukee county, requiring him to go rapidly from place to place, remaining but a day or two and often but a few hours at a time in any town, city, or village, returning to Milwaukee only occasionally and for a very brief stay before setting out again upon his business tours; that during the times mentioned the said *E. S. Hoyt* was a resident of Milwaukee county and was a bachelor without any family, having a rented room in New Hampshire block, on Grand avenue in Milwaukee, and that when at home he obtained his meals at restaurants and other places where he might find it convenient; that the deputy sheriff of said county, to whom said garnishee summons and affidavit were delivered for service, knew said *E. S. Hoyt* at the time; that while he had said garnishee summons and affidavit in his possession as such deputy sheriff he went to said room several times for the purpose of serving the same upon said *E. S. Hoyt*, but always found said room locked, and was informed by the janitor of the building, of whom he inquired for said *E. S. Hoyt*, that he was away from home; that,

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during said time he had possession of said garnishee summons and affidavit, he also inquired several times at the counting-room of said Webster Bros. in said city for said *E. S. Hoyt*, and sought information there as to his whereabouts, and was each time informed that he was in the country on a trip for said firm; that although he was several times informed at said counting-room where he was when last heard from, yet he was unable to learn where he would be at any definite time; that he was informed by persons in charge of said counting-room and store, and verily believed, that he was not expected to return to Milwaukee county within two or three weeks from the time said garnishee summons was so served upon said Kinney; that, from the search and inquiry so made by him after said *E. S. Hoyt*, he was, at the time of having possession of said garnishee summons, and was still on September 23, 1886, of the opinion that, after due diligence, service thereof upon said *E. S. Hoyt* could not be made within the state of Wisconsin, and he desired at said last-named date so to amend his return upon said summons that the same should so state; that as a matter of fact said *E. S. Hoyt* was in Milwaukee from the evening of August 14, 1885, to the forenoon of August 19, 1885, most of the time at the store of said Webster Bros., or at his said room; that, soon after the service of the garnishee summons on *Frank M. Hoyt*, the said *E. S. Hoyt* was fully advised by said *Frank M. Hoyt*, who was his real attorney and adviser in the matter, of the commencement of said garnishee proceedings, and he continued to be aware of their pendency and progress up to August, 1886, and that he had neglected to appear and answer or defend for the reason that *Frank M. Hoyt* would make and had made, as garnishee, every possible defense to such garnishment; that said *E. S. Hoyt's* affidavit and order to show cause were prepared under the supervision of said *Frank M. Hoyt*.

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For the appellants there was a brief signed by *E. Mariner* and *F. M. Hoyt*, garnishees, *in pro. per.*, and *Johnson, Rietbrock & Halsey*, attorneys for *E. S. Hoyt*, and the cause was argued orally by *Mr. Johnson* and *Mr. Mariner*. They contended, *inter alia*, that the service on the defendant was as clearly jurisdictional as that required to be made on the garnishee. A garnishee's liability is created by statute and can only be made to exist upon compliance with every condition imposed by the statute; and every such condition is therefore jurisdictional. *Steen v. Norton*, 45 Wis. 412; *Falkerts v. Standish*, 55 Mich. 463. Unless the failure to serve *E. S. Hoyt* was excused by proof that he could not, after due diligence, be found within the state, the service upon the garnishees was "void and of no effect from the beginning." R. S. sec. 2756; *Wise v. Rothschild*, 67 Iowa, 84; *Laidlaw v. Morrow*, 44 Mich. 547; *O'Rourke v. C., M. & St. P. R. Co.* 55 Iowa, 332; *Healey v. Butler*, 66 Wis. 9. Service on one of the members of the firm was insufficient, because, under our statute, service upon one partner will bind partnership property and that of the partner who was served, only when it appears that the partner who was not served could not with reasonable diligence be found within the state. R. S. sec. 2884; *Blackburn v. Sweet*, 38 Wis. 578; *Likens v. McCormick*, 39 id. 313. The fact that the officer's return was made before the expiration of the time limited for service shows that due diligence was not used, especially in view of the further fact that after the return was made, and for several days before the time for service had expired, *E. S. Hoyt* was in the city, at his lodgings and at his usual place of business. See *Thompson v. Morris*, 2 B. Mon. 35; *Hinman v. Borden*, 10 Wend. 367. In the latter case the syllabus is at war with the decision.

For the respondent there was a brief by *Stark & Sutherland*, and oral argument by *Mr. Stark*.

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CASSODAY, J. The issues upon the answer of the garnishee *Frank M. Hoyt* were fully tried by the court without a jury, and findings were made and judgment entered upon the merits in favor of the garnishee. Upon the appeal from that judgment, it was held by this court, in effect, that as the several chattel mortgages and assignments to the several creditors, transferring the entire property of the insolvent firm of E. S. Hoyt & Co., were made in pursuance of the same agreement, at substantially the same time, and all relating to the same subject matter, for the same common purpose of having one of such mortgagees and assignees, for himself and as agent and trustee for the others, take immediate possession and convert such property into money and divide the same *pro rata* among such favored creditors, they must be construed together as one instrument, and, when so construed, they constituted in legal effect a general assignment, with preferences for the benefit of such favored creditors, and hence, under the statutes, were void as to other creditors, including the plaintiff. 66 Wis. 227. A specific judgment was not directed upon that reversal, because certain computations were first necessary, which were left for the trial court. Accordingly, the judgment of the trial court was reversed, and the cause was "remanded for further proceedings according to law." Page 251. The words "according to law" manifestly meant according to the opinion of the court filed upon that appeal; for, without regard to the merit or demerit of that opinion, it necessarily became the law of the case. This being so, it would seem to follow that, upon the cause being remanded, the plaintiff was entitled to judgment against the garnishee in accordance with the determinations of this court in the opinion filed.

But, notwithstanding these things, it is now urged that such trial and judgment upon the merits in the county

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court, and such determinations in this court, were each and all nullities for want of jurisdiction, resulting from the alleged failure to serve the garnishee summons and affidavit upon one of the principal debtors composing the firm of E. S. Hoyt & Co. The statute requires such service to be made "on each of the several *garnishees* named, in the manner provided in secs. 2636, 2637, R. S., for service of a summons in an action." Sec. 2756, R. S. Neither of the sections thus referred to provides for service by publication or otherwise upon a defendant without the state, or upon one not found and having no usual place of abode with any family or with any person within the state. Sec. 2756 does not contemplate any service of garnishment being made upon the principal defendant debtor without the state or by publication; for, after providing for service upon the garnishees, it continues: "And, *except* where service of the summons *in the action* is made without the state or by publication, *also* on the defendant to the action *in like manner*, either before, *or within ten* days after, service on a garnishee. When the defendant shall have appeared in the action by an attorney, such service may be made upon such attorney or upon the defendant. *Unless* the garnishee summons be so served upon the defendant *or* his attorney, *or* the proof of service upon the garnishee show that, after due diligence, such service cannot be made within the state, the service on the garnishee shall *become* void and of no effect from the beginning." Sec. 2756, R. S.

The argument at the bar was devoted largely to the question whether this section makes such service upon the defendant in the principal action jurisdictional. Prior to the enactment requiring such service to be made upon the defendant in the principal action, embraced in the above statute, there would seem to have been no doubt but what the payment of money or delivery of property in good faith by a garnishee, in pursuance of a valid judgment of gar-

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nishment obtained without such service, was a complete protection against any subsequent claim or suit by the defendant in the principal action. *Rector v. Drury*, 3 Pin. 298; *Adams v. Filer*, 7 Wis. 306, 73 Am. Dec. 410. As said in this last case, such proceeding was *inter partes* to the record, and binding upon all the property of the defendant found within the jurisdiction of the court. But, to secure such protection, it was incumbent upon the garnishee to disclose every known defense, and, if necessary, notify the defendant in the principal action of the proceeding, and in good faith afford him an opportunity to defend his title. *Ibid.;* Freeman on Executions, § 418. In other words, there was to be no abuse of process. The difficulties arising out of such a state of the law, as illustrated by numerous cases which might be cited, undoubtedly led to the enactment mentioned. The manifest purpose of such enactment was not only to protect the garnishee but to conclude the defendant in the principal action by a final determination of the rights of all parties to the property or indebtedness sought to be reached by the garnishment. Accordingly, it is provided that the defendant in the principal action may in all cases defend against the garnishee proceedings upon any of the grounds authorized, and so the garnishee may, at his option, defend the principal action. Sec. 2765, R. S.

But sec. 2756, R. S., does not require such service in garnishment to be made upon the defendant in the principal action in all cases. On the contrary, it expressly provides, in effect, that such service need not be made in such garnishment whenever the service of the summons in the principal action is made without the state or by publication. In such actions against nonresident defendants so served, further service is dispensed with, and it is left as before the enactment. Jurisdiction in such cases of garnishment, where the defendant in the principal action is a nonresident, has

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been upheld mainly upon the ground that such proceeding is substantially *in rem* to subject specific property or credits to the payment of a specific debt. *Moore v. Wayne Circuit Judge*, 55 Mich. 87. In the case last cited the defendant in the principal action was a nonresident, but the garnishee papers were personally served upon him without the state, and it was held, in effect, that the trial court had jurisdiction as to property and credits in the hands of the garnishee. In *Cooper v. Reynolds*, 10 Wall. 317, Mr. Justice MILLER, speaking for the court upon this question, observed: "So, also, while the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the court over the thing and in effect subject it to the control of the court. Among this latter class is the levy of a writ of attachment or seizure of real estate, etc. . . . So the writ of garnishment, or attachment, or other form of service on a party holding a fund which becomes the subject of litigation, brings that fund under the jurisdiction of the court, though the money may remain in the actual custody of one not an officer of the court." To repeat what was said in another case: "As in a creditor's bill, so in supplementary proceedings, the commencement of them by the service of process or notice operates as an equitable levy and creates a lien in equity upon the effects of the judgment debtor; and every species of property belonging to him may be reached and applied to the satisfaction of his debts." *In re Milburn*, 59 Wis. 34. So the service of garnishee papers upon the garnishee operates as an equitable levy upon such of the debtor's property and credits as were at the time of such service in the hands of the garnishee.

Sec. 2756 provides, in effect, that when the defendant has appeared in the principal action by an attorney, then such

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garnishee summons and affidavit may be served upon such attorney instead of such defendant. Where the summons in the original action is personally served upon the defendant therein, the court thereby acquires jurisdiction of his person. His appearance by attorney in such original action gives the court no additional jurisdiction. Such appearance in such original action cannot be treated as an appearance in the garnishment, if that is to be regarded as a separate, independent jurisdiction as to him, to be acquired only by the service of garnishee process upon the defendant in the principal action as well as the garnishee. The same section provides, in effect, that said garnishee summons and affidavit need not be served upon the defendant in the principal action, nor the attorney who may have appeared for him therein, if the proof of service on the garnishee shows that, after due diligence, such service upon such principal defendant cannot be made within the state.

These several provisions of the section indicate pretty clearly that such service of garnishment upon the defendant in the principal action was not required for the purpose of securing a new and independent jurisdiction over such defendant personally or the property and credit sought to be thereby reached; for, if such service was designed as a condition precedent to the exercise of such jurisdiction, then it could not be dispensed with, for the court could not proceed without it. Maxw. Stat. 347. The garnishee summons is not required to be addressed to the defendant in the principal action, but only to the garnishee. Sec. 2754, R. S. The form given is entitled in the cause and designates the defendant in the principal action and also the garnishee, and closes with this: "Of which the said defendant will also take *notice;*"—adding the name of the plaintiff's attorney and his address. *Ibid.* Is such requisite service upon the defendant in the action anything more than a mere notice in a proceeding *in rem*, where the

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court has already acquired jurisdiction of the *res?* True, the statute provides, in effect, that, except in the three several cases mentioned where such service is expressly dispensed with, the garnishee summons must be so served on the defendant "either before, or *within ten days after*, service on the garnishee," or "the service *on* the *garnishee* shall *become* void and of no other effect from the beginning." Sec. 2756. Certainly the defendant has the right to insist upon the benefit of this provision. But in giving it a construction it is important to determine whether such service on the defendant is jurisdictional and hence a condition precedent, or a mere notice required after jurisdiction has been obtained and hence a condition subsequent.

As observed, the service upon the garnishee gives jurisdiction of the *res*. The service upon the defendant may be "before" the service upon the garnishee; but a failure to make it *before* does not preclude subsequent service upon the garnishee, as ten days are expressly given thereafter within which such service may be made upon the defendant. Such service upon the *garnishee* is only to "*become* void and of no effect from the beginning" when such service is not made upon the defendant "within ten days after service" upon the garnishee, and when neither of the three other conditions in which such service is dispensed with exists. The manifest purpose of such condition subsequent was not to give jurisdiction but to secure good faith and diligence in the giving of such notice, when it could be given within *ten days* after service upon the garnishee and thus obtain the objects of the enactment as stated. The condition affixed to the failure to serve the garnishee papers on the defendant in the case required, is in the nature of a penalty or forfeiture in consequence of such omission. It is like the condition that "the proceeding against the garnishee shall be dismissed," unless the plaintiff files "his complaint duly verified" in the clerk's office "within ten

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days after service of a garnishee summons upon a garnishee." Sec. 2758, R. S. Although a statutory condition precedent to jurisdiction cannot be dispensed with or waived, yet a statutory condition subsequent to the acquisition of such jurisdiction may be dispensed with or waived, especially where such statute is for the benefit of the party waiving the same, and no public right or policy is thereby invaded. Maxw. Stat. 345–351. Certainly, the defendant in the principal action may waive the service of garnishment upon him by voluntarily appearing in such proceedings. *Everdell v. S. & F. du L. R. Co.* 41 Wis. 395. This was strongly intimated in *Healey v. Butler*, 66 Wis. 14.

Here it appears that *E. S. Hoyt* was aware of the garnishee proceedings. He was the uncle and in the employ of the garnishee during much of the litigation. The garnishee, who is an able lawyer, instigated and manipulated the assignment, not in bad faith, but as we think under a mistaken view of the law, and acted as the principal counselor of his uncle both before and after the assignment, and assumed to act as attorney for his uncle and Kinney in withdrawing the traverse of the attachment and allowing judgment by default. Besides, the record fails to show any want of good faith or diligence in the attempt to serve the garnishee papers upon *E. S. Hoyt.* On the contrary, we think, the affidavit of the deputy sheriff, which is not overthrown, shows ordinary diligence to find *E. S. Hoyt*, and that he failed to find him or definitely locate him where he could be found within the state to make such service. It would be an unreasonable construction of the statute to require the sheriff or his deputies to make continuous search during every one of the ten days given for such service. A sheriff, especially in a county like Milwaukee, is liable to have numerous papers in his hands for service at the same time, as well as other duties. If he is bound to retain each paper in his hands until the last day for making return, and

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is, moreover, bound to make diligent search to serve each paper during every day he has possession of the same, then it is easy to perceive that such confusion of duties would render the administration of the office impracticable as well as excessively burdensome. True, the statute requires that the proof of service must show "that, after due diligence, such service cannot be made within the state." But this does not mean an absolute impossibility to make such service, nor the utmost diligence to make such service, nor anything more than "due," appropriate, fit, proper diligence,— that is, ordinary diligence. This does not require the garnishee summons and affidavit to be sent to, and returned by, every sheriff in the state. But even that might fail to secure service on a traveling man within a given time, since no sheriff could be in every place in his own county at the same time. It is enough, in the first instance, if they be delivered for service to the sheriff of the county where the party to be served resides. If the sheriff is unable to find such party after due diligence in his county, and he ascertains that such party has no usual place of abode with any family or person, and he is informed that such party has left the county to be absent traveling until after the ten days have expired, and he is unable to ascertain after such diligence where he could be found at any particular time within the ten days, so that service could be made upon him at that place, then he would be justified in returning that such party could not, after such diligence, be found within the state. But if he could ascertain with reasonable certainty where such party would be at some particular time within the period required, then an attempt, at least, should be made to serve at the time and place so ascertained. The deputy sheriff here seems to have been justified in coming to the contrary conclusion.

As this was a mere matter of notice after jurisdiction of the *res* had been acquired, there is another reason why *E. S.*

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Hoyt should here be held bound. The claim upon which the judgment in the original action was recovered, was a partnership indebtedness due to the plaintiff from E. S. Hoyt & Co. *E. S. Hoyt* appeared by attorney in that action, and judgment was entered therein against both members of the firm as by default. The property sought to be reached by garnishment was assigned to the garnishee by the firm. The garnishee papers were properly served upon Kinney, the other member of the firm, in time. The firm was in fact notified of the garnishee proceedings, and had every opportunity to defend. The court having acquired jurisdiction of the *res*, a notice to one of the partners respecting the same was, in effect, a notice to the firm. Colly. Partn. §§ 441-444. Whether one partner is authorized to enter the appearance of his copartner so as to give jurisdiction, is a question upon which much discussion has been had and much diversity of opinion exists. *Haslet v. Street*, 2 McCord, 310, 13 Am. Dec. 724, and cases cited in *notes*. We refrain from any expression of opinion upon that subject, as we regard the question here presented as one of notice and not of jurisdiction. In *Bowen v. Hastings*, 47 Wis. 232, it was expressly held that a former decision of this court affirming an order overruling a demurrer to a complaint on the ground of insufficiency by one of several joint contractors who alone appealed to this court, was binding and conclusive upon the other defendants and joint contractors in all subsequent proceedings. That case was followed, and the same doctrine re-affirmed, in *Lauer v. Bandow*, 48 Wis. 638. No substantial reason has been presented for disturbing these adjudications. Moreover, it is, in effect, provided by statute that in an action against two or more "jointly indebted upon a contract," where only one of them is served with summons, judgment may be entered in form against all the defendants thus jointly indebted, and be enforced against the joint property of all and the

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separate property of the defendant served. Subd. 1, sec. 2884, R. S. Under this statute, there could be no question but what the plaintiff might have taken such judgment in form against both the members of the firm upon service of summons upon Kinney alone, and then seized the firm property upon execution issued thereon. But, as stated, here both members of the firm appeared in the original action, so that jurisdiction *in personam* of the defendants was complete. An *alias* execution was issued thereon, and in aid of the same the garnishees and Kinney, one of the joint contractors and judgment debtors, were properly served. By such proceedings jurisdiction over the property and credits of the firm in the hands of the garnishees was secured. An attempt was also made in good faith to serve the garnishee papers upon the other partner, *E. S. Hoyt*, who was fully aware of the garnishee proceedings pending the litigation. To say that such firm property and credits were not thereby bound so far as to subject the same to the plaintiff's claim, and that the whole litigation and adjudication should become void and of no effect from the beginning, on the motion of *E. S. Hoyt*, would be a trifling with justice and the substance of things in order to exalt a mere technicality.

By the Court.— Both of the orders of the county court appealed from in this action are affirmed, and the cause is remanded for further proceedings according to law.

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CORNING and others, Appellants, vs. HOYT and another, Defendants, HOYT and others, Garnishees, etc., Respondents.

February 4 — March 1, 1887.

Garnishment: Service on principal defendant.

Winner v. Hoyt, ante, p. 278, followed.

APPEAL from the County Court of *Milwaukee* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

It appears from the record that January 28, 1886, and after the plaintiffs had commenced an action in the county court for Milwaukee county against the defendants, *E. S. Hoyt* and Wesley Kinney, one of the garnishees, *Frank M. Hoyt*, served upon the plaintiffs' attorneys notice of retainer by and appearance for said defendants in said action; that such proceedings were had therein that February 9, 1886, the plaintiffs obtained judgment against said defendants therein for $972.92 damages and costs; that the same was docketed on that day; that May 15, 1886, an *alias* execution was issued on said judgment; that on the same day garnishee summons and affidavit were duly served upon each of the several garnishees; that May 18, 1886, they were personally served upon Wesley Kinney and on the same day an attempt was made by the sheriff to serve the same upon *E. S. Hoyt;* that June 4, 1886, the garnishee *Alice McLeod* answered, denying that she was indebted to the defendants or had possession of any of their property; that June 24, 1886, the plaintiffs took issue with such answer of the garnishee; that June 24, 1886, the plaintiffs were ordered to show cause why the garnishee summons and affidavit should not be vacated and set aside for want of service of the same upon *E. S. Hoyt* within ten days after the service thereof upon the garnishees; that December 4,

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1886, it was ordered by the court, in effect, (1) that the plaintiffs' application to file an amended or supplemental return be denied; (2) that the motion of *E. S. Hoyt*, and of the garnishees, to dismiss the garnishee proceedings be granted, and the same was thereby dismissed. From that order the plaintiffs appeal.

For the appellants there was a brief by *Finches, Lynde & Miller* and *E. P. Smith*, and oral argument by *F. W. Cotzhausen*.

For the respondents there was a brief by *E. Mariner* and *Frank M. Hoyt*, attorneys for the garnishees, and *Johnson, Rietbrock & Halsey*, attorneys for *E. S. Hoyt*, and the cause was argued orally by *Mr. Johnson* and *Mr. Mariner*. To the point that the garnishee proceeding is statutory and anomalous, and that all statutory requirements not purely directory are jurisdictional, they cited *Gibbon v. Bryan*, 3 Ill. App. 298; *Railroad Co. v. Todd*, 11 Heisk. 539; *Greene v. Tripp*, 11 R. I. 424; *Smith v. McCutchen*, 38 Mo. 415; *Ford v. Dry Dock Co.* 50 Mich. 358; *McDonald v. Vinette*, 58 Wis. 619; *Wells v. Am. Exp. Co.* 55 id. 23.

Cassoday, J. We assume, for the purposes of this case, that the attempt to serve the garnishee summons and affidavit upon *E. S. Hoyt* was a failure. But they were duly served upon the other defendant, Wesley Kinney. They were also duly served upon *Frank M. Hoyt*, who had appeared in the original action twelve days before the entry of judgment. For the reasons given in the opinion filed herewith in the case of *Winner v. Hoyt*, *ante*, p. 278, we must hold that the court had jurisdiction of the property and credits in the hands of the garnishees, and that the notice given was sufficient to prevent the service on the garnishees from becoming void and of no effect from the beginning.

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By the Court.—The order of the county court appealed from in this action is reversed, and the cause is remanded for further proceedings according to law.

EMIL KIEWERT COMPANY, Appellant, vs. HOYT and another, Defendants, MARINER and others, Garnishees, etc., Respondents.

February 4—March 1, 1887.

Garnishment: Service on principal defendant.

Winner v. Hoyt, ante, p. 278, followed.

APPEAL from the Circuit Court for *Milwaukee* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

It appears from the record that June 3, 1885, the plaintiff recovered a judgment in the circuit court for Milwaukee county against *E. S. Hoyt* and Wesley Kinney upon a claim upon which they were liable as copartners, for the sum of $519.25; that after the issuance of an execution and before it was returned or returnable, and on May 15, 1886, garnishee proceedings were commenced by the due service of garnishee summons and affidavit upon the several garnishees named by the sheriff; that May 18, 1886, the garnishee summons and affidavit were duly served upon the defendant Kinney by the sheriff, who returned, in effect, that on the same day he served the same "on the defendant *E. S. Hoyt*, by leaving at his room in the Hampshire block a true copy thereof and of each of them; said defendant *E. S. Hoyt* not having been found, he being a traveling man and not married,—has no family;" that June 4, 1886, one of the garnishees, *Mrs. McLeod*, answered, denying the possession of any property or credits; that June 24, 1886, the said

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E. S. Hoyt and also the garnishees obtained separate orders to show cause why the service of garnishment should not be vacated and set aside for the reason that said garnishment papers were not served upon said *E. S. Hoyt* either before or within ten days after the service upon the garnishees, as they might have been, nor at all; that thereupon, and before the hearing of the motions or the filing of the said sheriff's return, he amended the same by adding: "I further certify that after using due diligence, search, and inquiry, I could not find the within-named defendant *E. S. Hoyt* in my county or state;" that said *E. S. Hoyt* was, during the time, a bachelor, and for three years had occupied apartments in said New Hampshire block, in Milwaukee, and taken his meals at hotels and restaurants, wherever it happened to be convenient; that he was in the employment of Webster Bros., of Milwaukee, and his business kept him much of the time traveling on the road, but always within the state, and never concealed; that his whereabouts could always be ascertained by inquiry at the office of Webster Bros.; that he was openly going about in the city of Milwaukee from May 14, 1886, to May 18, 1886, inclusive; "that the indebtedness, money, property, credits, or effects in the hands of said garnishees, and which is sought to be reached by this garnishment proceeding, is solely and only the copartnership assets of said *Hoyt* and Kinney; and none other;" that August 7, 1886, and upon the records and proceedings in the cause, the court ordered, in effect, that the orders to show cause be made absolute, that the service of the garnishee summons in this action upon the several garnishees therein named be vacated and set aside, and declared void from the beginning, and that the garnishees be discharged from all liability in the action. From that order the plaintiff appeals.

For the appellant there was a brief by *Cotzhausen, Sylvester, Scheiber & Sloan*, and oral argument by *Mr. Cotzhausen.*

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For the respondents there was a brief by *E. Mariner* and *Frank M. Hoyt*, attorneys for the garnishees, and *Johnson, Rietbrock & Halsey*, attorneys for *E. S. Hoyt*, and the cause was argued orally by *Mr. Mariner*.

CASSODAY, J. For the reasons given in the opinion filed herewith in the case of *Winner v. Hoyt*, *ante*, p. 278, we must hold that the court had jurisdiction of the property and credits in the hands of the garnishees, and that the notice given was sufficient to prevent the service on the garnishees from becoming void and of no effect from the beginning.

By the Court.— The order of the circuit court appealed from is reversed, and the cause is remanded for further proceedings according to law.

BONNEVILLE, Appellant, vs. THE WESTERN ASSURANCE COMPANY, Respondent.

February 4—March 1, 1887.

INSURANCE AGAINST FIRE. *(1) Additional insurance without consent: Forfeiture: Waiver. (2) Assured bound to know contents of policy.*

1. Plaintiff obtained a policy of insurance from the defendant company for $1,000, which provided that if he obtained additional insurance without the consent of the company the policy should become void. At the time of issuing the policy defendant's agent offered to take an additional risk of $1,000, but plaintiff declined the offer. Afterwards plaintiff procured additional insurance in other companies to the amount of $1,800, and told defendant's agent that he had taken additional insurance, but did not state the amount. After a loss had occurred, plaintiff was told by defendant's agent that his policy required proofs of loss, which the plaintiff accordingly made and forwarded to the company. Neither the defendant nor its agent knew until such proofs of loss were received the amount of the additional insurance. *Held:*

(1) Assuming that the offer of the agent to take an additional risk amounted to a consent to additional insurance to the amount

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of $1,000, still the obtaining of such insurance in excess of that sum avoided the policy.

(2) The requiring of proofs of loss, without knowledge of the amount of the additional insurance, did not constitute a waiver of the forfeiture or estop the company to assert the same.

2. The assured is bound by a condition in his policy avoiding it in case he obtains additional insurance without consent, although he did not know that his policy contained such condition.

APPEAL from the Circuit Court for *Milwaukee* County.

The action is upon an insurance policy for $1,000 issued by the defendant company to the plaintiff on a stock of drugs. It bears date June 23, 1884, and is for one year. In February, 1885, the insured property was destroyed by fire, and thereafter the plaintiff made due proofs of loss as required by the policy. The defense to the action is an alleged breach of the following stipulation in the policy: "If the assured shall have, or shall hereafter make, any other contract of insurance, *whether valid or not, on the property hereby insured*, or any part thereof, without the consent of this company written hereon, . . . then, and in every such case, this policy shall *become void*." The italics are in the policy. On the trial, after the plaintiff rested his case, the court granted the motion of defendant for a nonsuit. A motion by the plaintiff for a new trial was denied, and judgment entered dismissing the complaint with costs. The testimony is stated in the opinion. The plaintiff appeals from the judgment.

For the appellant there was a brief by *Cotzhausen, Sylvester, Scheiber & Sloan*, and oral argument by *Mr. Cotzhausen*. They contended, *inter alia*, that the breach of a condition by the insured is not sufficient of itself to put an end to the contract, but it must be followed within a reasonable time after notice by an unequivocal act on the part of the insurer, who means to avail himself of the opportunity to assert a forfeiture of the policy. *Appleton Iron Co. v. British Am. Ass. Co.* 46 Wis. 33; *Webster v. Phœnix*

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Ins. Co. 36 id. 71; *Insurance Co. v. Norton*, 96 U. S. 234; *Viele v. Germania Ins. Co.* 26 Iowa, 9; *Joliffe v. Madison Mut. Ins. Co.* 39 Wis. 119; May on Ins. (2d ed.), secs. 372, 502; Wood on Ins. 831; Bliss on Life Ins. sec. 272; *T. L. Ins. Co. v. Anderson*, 77 Ill. 384; *M. L. Ins. Co. v. French*, 30 Ohio St. 240; *G. M. M. L. Ins. Co. v. Gibson*, 52 Ga. 640; *Osterloh v. New Denmark M. H. F. Ins. Co.* 60 Wis. 126; *Morrison v. Wis. O. F. M. L. Ins. Co.* 59 id. 163. The right to assert forfeiture in this case was waived not only by laches but by the affirmative acts of the company in requiring proofs of loss. *N. W. Mut. L. Ins. Co. v. Germania Fire Ins. Co.* 40 Wis. 446; *Webster v. Phœnix Ins. Co.* 36 id. 67; *Gans v. St. P. F. & M. Ins. Co.* 43 id. 109. Knowledge of the agent was notice to the company. *Gans v. St. P. F. & M. Ins. Co.* 43 Wis. 109; *Miner v. Phœnix Ins. Co.* 27 id. 693; *Sherman v. Madison Mut. Ins. Co.* 39 id. 104; *American Ins. Co. v. Gallatin*, 48 id. 46; *Schomer v. Hekla F. Ins. Co.* 50 id. 575. Presumptively the assured knew of the condition, but this presumption is not conclusive. *Boorman v. Am. Exp. Co.* 21 Wis. 152; *Strohn v. D. & M. R. Co.* id. 554; *Fuller v. Madison Mut. Ins. Co.* 36 id. 599; *Morrison v. P. & C. Const. Co.* 44 id. 405.

For the respondent there was a brief by *Lusk & Bunn*, and oral argument by *Mr. Lusk.*

LYON, J. The contract of insurance was made with the plaintiff by one Winchester on behalf of the defendant company. Winchester was a local agent of the company, and had due authority to bind it by the contract. When the policy was issued Winchester offered, on behalf of the company, to take an additional risk of $1,000 (being $2,000 in all) on plaintiff's stock of goods; but the plaintiff declined such offer. In November, 1884, the plaintiff obtained of one Roomer, another insurance agent, three policies for $600 each, from three other companies respect-

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ively, on the same stock of goods. This he did without the consent or knowledge of Winchester or the defendant company, unless such consent can be implied from the fact that Winchester was willing to take for the defendant an additional risk of $1,000 on the insured property. Soon afterwards, however, plaintiff told Winchester, in a general way, that he had taken additional insurance of Roomer. There is no testimony which would justify a finding that he told Winchester the amount of the insurance, or in what companies it was taken; or that the latter or any other agent of the defendant company knew those facts until the plaintiff made proofs of loss as hereinafter stated. When so told of such additional insurance, Winchester expressed his disapprobation.

Soon after the insured property was destroyed by fire Winchester knew the fact, and in March following plaintiff notified the company of his loss. About the same time Winchester told the plaintiff that his policy required proofs of loss, whereupon the plaintiff made out and forwarded to the company formal proof of loss, as required by the policy, which shows the additional insurance. The plaintiff testified that after the fire a person claiming to be an adjuster also told him he must make proofs of loss, but the testimony is entirely insufficient to sustain a finding that such person was an agent of the defendant company or acting for it.

From the foregoing statement of the testimony, it is obvious that the nonsuit was properly ordered, unless the failure of the company to declare the policy forfeited when its agent, Winchester, was informed of the additional insurance, is a waiver of such forfeiture, or unless the company is estopped to assert the forfeiture because Winchester told the plaintiff, after the insured property was burned, that the policy required him to make proofs of loss, which he accordingly made.

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It will be remembered that Winchester offered to take an additional risk of $1,000 on the insured property. It will be most favorable to the plaintiff to assume that this offer has the effect of a consent by Winchester, by which the company is bound, that the plaintiff might obtain additional insurance to that amount. It is probable that Winchester so regarded it when informed that the plaintiff had procured additional insurance. The amount so procured was not stated to him, and he had the right to assume, as presumably he did, that the additional insurance was within the limits of such consent. Hence, when Winchester was informed of the additional insurance, and also when he advised the plaintiff that his policy required proofs of loss, neither he, nor the company whose agent he was, had any knowledge that the additional insurance procured by the plaintiff worked a forfeiture of the policy. There was no occasion, therefore, to declare a forfeiture of the policy, or to abstain from calling for proofs of loss, until the company received information, in such proofs, of the facts causing the forfeiture. It is not claimed that the company or its agents did or omitted to do anything, after receiving such information, which operates as a waiver of the forfeiture or estops it to assert the same as a defense to this action. The result would be the same had the defendant's adjuster called upon the plaintiff to furnish proofs of loss. It is very clear that the testimony fails to bring this case within the rule of *Webster v. Phœnix Ins. Co.* 36 Wis. 67, and other cases in this court in which the rule of that case has been applied.

We conclude that a breach of a stipulation in the policy which works a forfeiture of the contract of insurance was conclusively proved, and that there is no testimony tending to show a waiver of such forfeiture by the company or any facts which estop it to assert the same as a defense to an action on the policy. Hence the court properly nonsuited the plaintiff.

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On the trial the plaintiff offered to testify that he did not know his policy contained the clause or stipulation in question, and that he was a novice in insurance business, being entirely unfamiliar therewith. Objections to such offered testimony were sustained. The rulings in this behalf were correct. *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 599.

By the Court.—The judgment of the circuit court is affirmed.

BLAKE, Respondent, vs. BLAKE, Appellant.

February 4—March 1, 1887.

Divorce: Alimony or partition of estate?

Every provision made in a judgment of divorce for the support of the wife, unless it is expressly declared to be a division and partition of the estate of the husband, will be construed as alimony, and the court may afterwards, under changed circumstances, modify such judgment as may be just.

APPEAL from the Circuit Court for *Milwaukee* County.

The case is stated in the opinion.

E. Mariner, for the appellant.

J. A. Eggen, for the respondent.

TAYLOR, J. This is an appeal from an order of the circuit court, made in an action for divorce from the bonds of matrimony, directing that further alimony be allowed the respondent, and that a hearing be had before the court for the purpose of adjusting the terms of the order for future alimony.

The original judgment for a divorce was made in 1882. After the recitals, said judgment reads as follows: "Now, upon motion of Adolph Herdegen, plaintiff's attorney, E. Mariner, Esq., the attorney for the defendant, being present

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and making no objections, it is hereby adjudged and decreed that the marriage contract existing between the plaintiff and defendant herein be, and hereby is, dissolved. And it is further adjudged and decreed that said plaintiff, *Christine Blake*, and said defendant, *Barnum Blake*, be, and are hereby, forever divorced from the bond of matrimony and freed from the obligations thereof. And it is further ordered and adjudged that the defendant, *Barnum Blake*, have the care, custody, and education of the minor children, John F. Blake and Arthur O. Blake, mentioned in the complaint herein. And it is further ordered and adjudged that the defendant, *Barnum Blake*, pay to *Christine Blake*, the plaintiff herein, the sum of $2,000, upon the execution by her of a release in full of all her dower right that she ever had, now has, or at any time might have, in any of the real estate owned by the defendant, *Barnum Blake*, during coverture. And it is further ordered and adjudged that the plaintiff have costs of this action, and that she have execution therefor."

The following is a copy of the order appealed from:

"The plaintiff's motion to modify the judgment herein, dated May 6, 1882, by further adjudging to her alimony out of defendant's income and property, having come on to be heard on the 23d day of October, 1886, and the same having been submitted by the plaintiff on the order to show cause dated September 25, 1886, on the verified and filed petition of said plaintiff, and on the record and judgment roll of this cause, and on the oral argument of J. A. Eggen, plaintiff's attorney, and by the defendant on said record and judgment roll, on the affidavit of the defendant, and on the oral argument of E. Mariner, Esq., his attorney, and the court having taken the motion under advisement, and being now sufficiently advised in the matter, the court finds that this case is a fit and proper one in which to allow alimony as prayed for in said petition. Now, therefore, on motion of J. A. Eggen, plaintiff's attorney, it is ordered and

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adjudged that said motion be, and the same hereby is, granted, with ten dollars costs. And it is further ordered and adjudged that, for the purpose of fixing and adjusting the terms of such further or additional judgment, a hearing be had before this court, at which due proof may be taken of all pertinent facts. And it is further ordered that the plaintiff, or her attorney, give the defendant's attorney due notice of the time and place of such hearing, in the manner required by law.

"*Dated November 26, 1886.*

"By the court. CHARLES A. HAMILTON,
"Circuit Judge."

The petition upon which this last order is based is found in the record, and charges that the original judgment giving the petitioner the $2,000 mentioned in said judgment as her allowance in said action was procured by fraudulent practices on the part of the defendant and his agent in concealing from her the amount and value of the defendant's property at the time, and inducing her to believe that he had far less property than he was in fact possessed of. Whether the learned circuit judge, in making the order appealed from, was induced to do so by reason of the charges of fraud in obtaining the original judgment, or simply because he thought the order in the original judgment giving the plaintiff $2,000 was an order for alimony under sec. 2364, R. S., and not a division and distribution of the estate, both real and personal, of the defendant, as authorized by the further provisions of said sec. 2364, does not appear. It is claimed on the part of the learned counsel for the appellant that the court made the order because in his opinion the judgment did not make a division and distribution of the defendant's property under said section, but was simply a judgment for alimony proper and so subject to modification by the court as might be just considering the changed circumstances of the parties, under the provisions of sec. 2369,

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R. S. For the purposes of this appeal we shall adopt the suggestion of the learned counsel as to the ground upon which the circuit court proceeded in making the order.

Upon this appeal the learned counsel for the appellant claims that the original judgment in this case is a judgment dividing and distributing the estate, both real and personal, of the husband, between the parties, as authorized by said sec. 2364, and so is final as between the parties, as prescribed by the last paragraph of sec. 2369, which reads as follows: "But when a final division of the property shall have been made under the provisions of sec. 2364, no other provision shall be thereafter made for the wife." It is urged by the learned counsel that the judgment in the action must be read in connection with the findings of the court in said action, and that, when so read, it is apparent that the court did make a division and distribution of all of the estate, real and personal, of the husband, between himself and his wife, as contemplated and authorized by said sec. 2364, R. S., and that the judgment is therefore final between the parties.

The only parts of the findings in the original action which have any bearing upon the question are the following: "*Fifth.* That while the parties lived together as man and wife, before such separation, the said defendant was seized of certain real estate, and that they have agreed in open court, the plaintiff to accept, and the defendant to pay, the sum of $2,000 in full of alimony and for a full share of plaintiff's claim in and to any property of which the defendant has been seized during coverture. And, as a matter of law, that the plaintiff is entitled to judgment of divorce from the bonds of matrimony, and that she have and recover from the said defendant the sum of $2,000, besides the costs of this proceeding, and that, upon executing and delivering to the defendant or his attorney, or filing with the clerk for him, a good and sufficient release of all the

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real estate and property of which the said defendant has been seized during coverture, in full of any claim for alimony from said defendant, she have execution therefor upon such judgment."

The judgment provides as follows: "And it is further ordered and adjudged that the defendant, *Barnum Blake*, pay to *Christine Blake*, the plaintiff herein, the sum of $2,000, upon the execution by her of a release in full of all her dower right that she ever had, now has, or at any time might have, in any of the real estate owned by the defendant, *Barnum Blake*, during coverture." The judgment further shows that the parties had lived entirely separate for five years next preceding the commencement of the action. The judgment also finds that the defendant had wilfully deserted his wife. There is another fact which appears in the case, that may give some light as to what was intended by the judgment which required a release of her dower in the defendant's real estate before she could be entitled to the $2,000 awarded to her. The defendant had real estate in the city of Chicago of considerable value at the time, and which has since become of large value, and the divorce of the parties in this state for the fault of the defendant would leave that property subject to the dower right of the plaintiff, notwithstanding the divorce. See 1 Starr & C. Ann. Stat. Ill. 904.

Under the decisions of this court, we think it is manifest that there was no judgment entered in this action dividing and distributing the estate of the defendant, real and personal, between the parties, so as to make such judgment final under the provisions of the statute. The findings of fact and conclusions of law do not show that such was the intention of the court, and there is no claim that the judgment in itself shows any such intention on the part of the court. The finding of fact expressly relied upon says that the $2,000 she is to receive is "*to be in full of alimony* and

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for a full share of the plaintiff's claim in and to any property of which the defendant has been seized during coverture." The matter of law found by the court shows what was intended by her "claim to any property," etc. It was her dower right in his real estate, which was not divested by the judgment of divorce. A release of this dower right for a consideration was clearly not a division and distribution of the defendant's estate, both real and personal. It was simply a surrender of a right which the plaintiff had in and to the real estate of the defendant, notwithstanding the judgment for divorce in the case. Taking the finding in its broadest extent, it was only adjudged that she should have the $2,000 in full for alimony and for her release of dower in the defendant's real estate of which he was seized during coverture; and the $2,000 was not adjudged to her as a just and equitable division and distribution of the property of the defendant under the statute.

It has been repeatedly held by this court that a judgment in a divorce suit, which gives a gross sum in full for alimony, does not prevent the court from afterwards modifying the judgment under sec. 2369, R. S., if the circumstances of the parties have so changed as to render such modification just and equitable. *Thomas v. Thomas*, 41 Wis. 229, 233. The giving a gross sum to the wife in a divorce suit is deemed to be for alimony, unless the contrary is expressly stated in the judgment. *Hopkins v. Hopkins*, 40 Wis. 462, 466; *Campbell v. Campbell*, 37 Wis. 206. It is held that the court cannot divest itself of authority to revise a judgment for alimony, except by rendering a judgment making a division and distribution of the property of the parties as authorized by the statute. See, also, *Bacon v. Bacon*, 43 Wis. 209. These cases have discussed the question involved in this appeal in all its aspects, and the law in this state must be considered as settled that every provision made for the support of a wife in a divorce case,

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whether it be a gross sum or payments to be made annually or otherwise, or if it be personal property to be delivered, is presumed to be for alimony, whether so expressly stated or not, and that the court may afterwards, under changed circumstances, modify such judgment as may be just to the parties; and no such judgment will be construed to be a division and partition of the estate of the husband, under the statutes, unless it be so expressly declared by the judgment of the court. This being so, and considering the findings of fact and conclusions of law a part of the judgment, there is nothing in this case which shows that there was any division of the estate of the husband under the statute; and so the judgment is subject to be modified by the court.

By the Court.—The order of the circuit court is affirmed.

COLCLOUGH, Appellant, vs. NILAND, Respondent.

February 4 — March 1, 1887.

Landlord and tenant: Appeal to S. C.: Evidence: Bill of exceptions.

1. In an action for rent the defendant counterclaimed for damage to his goods caused by leakage through the ceiling. It did not appear that the tenant occupying the room above, through the floor of which the water passed, was responsible for the damage. The court admitted evidence under the counterclaim, but in the charge to the jury the counterclaim was not mentioned, and if the jury considered it at all (which is very doubtful), the amount allowed on it must have been very small. *Held*, that the admission of the evidence was not ground for a reversal of the judgment.
2. When it is alleged as error that the trial court refused to strike out hearsay evidence given by a witness on his cross-examination by appellant's counsel, the record should show whether or not such testimony was responsive to the question asked.

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APPEAL from the County Court of *Milwaukee* County.

The facts are sufficiently stated in the opinion. The plaintiff appealed from a judgment on the verdict for the defendant.

Henry L. Buxton, for the appellant.

For the respondent there was a brief by *Clark & McAuliffe*, and oral argument by *Mr. McAuliffe*.

ORTON, J. The plaintiff sued the defendant for rent and for repairs of building made necessary by the improper use of the building and his negligence as tenant, and the defendant denied the cause of action and counterclaimed for damages caused by leakage through the ceiling upon his goods. There was no controversy about the rent, and the amount seemed to be about $22, and the defendant tendered, after suit, $30 and costs. The evidence was very conflicting upon the matters in controversy, and there does not appear to have been any such preponderance against the verdict as to warrant the interference of this court upon the merits. The jury found for the defendant, by which it may be inferred that they regarded the tender sufficient to pay the rent and some part of the other claims of the plaintiff, or allowed all of such claims, deducting the counterclaim; but just how they viewed the case it is impossible to tell. To reverse the judgment on the merits this court would have to pass upon all the evidence as an original question or as upon a trial *de novo*, which we have no right to do. We can only reverse when there was no evidence to sustain the verdict, or when there was a clear preponderence of the evidence against it. That this court might not have found upon the facts proved as the jury did, is not the question.

The errors of law assigned are very few and quite unimportant.

1. The learned counsel of the plaintiff objected to the

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evidence of the defendant that "the water poured through the floor and came on top of the goods," and also objected to all of the evidence offered to support the counterclaim, on the ground that the tenant occupying the rooms above the store, through the floor of which the water passed, was responsible, and not the landlord, for all the damages so occasioned. If this had clearly appeared to have been the fact, such evidence was improper. But from the evidence in the printed case it did not so appear. It did not appear that the water fixtures in the room above were in proper repair when such room was rented to the tenant, and it did not very clearly appear that the water that did the mischief came only from defects in, or negligence in managing, the water pipes in the room above. The defendant testified that "there was a time when the water leaked through between the two stores in the rear of the stairway; and at one time it leaked through the roof, and at another time from the faucets upstairs right over him." It did not appear what the contract relations were between the plaintiff and the tenant above as to repairs. But it is extremely doubtful whether the jury at all considered the defendant's counterclaim; for nothing was said about it in the charge of the court, and there was evidence to sustain the verdict without considering it; and, if they did take it into consideration, the amount allowed must have necessarily been very small.

2. The learned counsel of the appellant moved to strike out the testimony of the boy Grimshaw, given on cross-examination by the counsel himself, as follows, viz.: "I asked him if he let it down, and he said 'yes,' and not to say a word about it." The witness had testified, "I knew the boy let this [the awning that probably broke the window] down, because I seen him standing in the doorway," and then, it is claimed, the witness volunteered the above. This testimony, clearly improper in itself, might have been

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responsive to the question asked, and if so the appellant was bound by it. The question is not given in the printed case, and therefore it does not appear that this evidence ought to have been stricken out. But it is quite evident that the jury could not have been misled by it. The witness had stated that he knew the boy let the awning down; and if he saw him do it, and the boy immediately said that he did do it, and not to tell any one, it would be hard to separate his words from his act. At all events, we think it was quite immaterial, so far as it could have affected the verdict.

The exceptions to the charge of the court are not pressed in appellant's brief, and the instructions in all respects appear to have been clear, impartial, and correct.

By the Court.— The judgment of the county court is affirmed.

MORAWETZ, Respondent, vs. MCGOVERN, Appellant.

February 5 — March 1, 1887.

(1, 2) Instructions to jury: Immaterial error: Measure of damages. (3) Evidence: Collateral inquiries. (4) Interest: When demand becomes liquidated.

1. The instructions in this case (stated in the opinion) are *held* to have fairly submitted to the jury the question whether the ice-box for the contract price of which the action was brought was so constructed that with proper use it would answer the purposes of its construction.
2. An error in an instruction as to the measure of damages becomes immaterial if the jury entirely disallow the claim for such damages.
3. The question being whether the ice-box for the price of which the action was brought was properly constructed to fulfil its purposes, and the plaintiff having testified that, as on all other ice-boxes, his work was done in a good, substantial, and workmanlike man-

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ner, but there being no evidence of any other similarity in the boxes, it was not competent for the defendant to ask if the plaintiff ever got or asked for his pay for one of the other boxes, or to show how one of the other boxes "turned out."

4. An unliquidated account becomes liquidated by the presentation of a bill therefor and a promise of payment at a certain time, and after that time the debt bears interest.

APPEAL from the County Court of *Milwaukee* County.

The case is thus stated by Mr. Justice CASSODAY:

This action was brought in justice's court. The complaint declared upon an account in writing, which charged the defendant with the contract price of an ice-box, $90, and $48.41 for extra work thereon and interest. The answer alleged damages for failure to build the ice-box according to contract. October 23, 1885, and upon trial had, the plaintiff recovered judgment for $141.63 damages, and $26.32 costs. On appeal therefrom to the county court, the defendant amended his answer to the effect that it denied what was not admitted; admitted the performance of the extra work, but denied any knowledge or information as to its value; alleged a specific contract to build the ice-box so it should be fit for the purpose of keeping large quantities of meat in the summer without decomposition; that the box was defectively built, and unfit for the purpose; that the defendant tendered it back, which was refused; and claimed $300 damages by way of counterclaim. The plaintiff replied to the counterclaim. Upon a trial being had upon such issues, the jury returned a verdict in favor of the plaintiff for $146.89. From the judgment entered thereon the defendant appeals.

Henry L. Buxton, for the appellant, contended, *inter alia*, that as the case was tried below partly upon the theory that the sweating of the box was caused by the ventilator leading out from the top, and as the plaintiff's testimony tended to show that the cold air from the box would be

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pushed out of the ventilator, while the defendant's testimony tended to show that the warm outside air would come into the box through the ventilator, thus causing condensation and mould, the jury had a right to suppose from the judge's charge that they were charged that the air from the box would "always displace warm air" and go up through the ventilator. The charge was therefore clearly misleading, to the injury of the defendant.

For the respondent there was a brief by *Austin, Runkel & Austin*, and oral argument by *Mr. R. N. Austin*. To the point that a judgment will not be reversed for an error which adds but a trifling amount thereto, they cited *Tucker v. Cole*, 54 Wis. 539; *Hass v. Prescott*, 38 id. 146; *Holzhauer v. Milwaukee*, 41 id. 638.

CASSODAY, J. 1. It is claimed that the undisputed evidence shows that the plaintiff was to construct an ice-box that would be dry on the inside in use, but that this was not. There was evidence tending to show that it was dry when first constructed and in the possession and use of the defendant, and then had no holes in the zinc, but that a week or two subsequently it was examined, and found to leak and have holes in the zinc, apparently made with a sharp instrument like a knife, and others just as though they had been punched through with a punch or scratch, or something like that. There being evidence to sustain the verdict, it is unavailing to argue that the preponderance of the evidence is against it.

2. Error is assigned because the court charged the jury that, "so far as the philosophy of the different elements is concerned, it is not necessary that I should charge you that cold air always displaces warm air. We all know that, and it does not require me to charge you, as a question of law, that that is the fact." In the same connection the court charged the jury that "the question is whether these two

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elements have been brought into such a relation or subjection to each other as that the box constructed by the plaintiff for the defendant was sufficiently supplied with cold air, which was produced from the ice in the top of the box, and to obtain the result which was desired on the part of the plaintiff and which the defendant expected; and those are the propositions you must solve from the testimony in this case,— whether this ice-box was so constructed as that it would answer the purpose for which it was constructed by a proper use of it in the business in which the defendant was engaged." This fairly submitted the question of fact at issue to the jury. We perceive no reason why they should be misled by it.

3. Error is assigned because the court charged the jury that "if you find the box was defective, if, after discovering that defect, the defendant, within a reasonable time, tendered the box back to the plaintiff, and the plaintiff refused to receive it, then the defendant would be entitled to recover the damages that he sustained in consequence of plaintiff's non-conformance with the contract, *and those damages would be the price paid.*" Had the jury allowed the defendant anything by way of recoupment or counterclaim, the question here sought to be raised might have been pertinent. But, as the jury entirely disallowed any and all claim of the defendant for damages on his counterclaim, it is obvious that the jury were not misled nor the defendant prejudiced by this charge limiting the amount of such damages.

4. The plaintiff testified on direct examination, in effect, that the work on this ice-box was done in a good, substantial, and workmanlike manner,— the same as he did on all others; and on cross-examination that he had made a box for Dykens. He was then asked "if he ever got his pay, or asked for it." This question was properly excluded. It was entirely collateral to the issue on trial.

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5. One of the defendant's witnesses, on his direct examination, and after having testified about the ice-box in question, stated that the plaintiff made an ice-box for him. He was then asked: "How did that turn out?" The exclusion of this question was proper for the same reason as the other. Besides, there was no evidence of any similarity in such boxes, except that the work was done in a good, substantial, and workmanlike manner on all. This might all be true, and still the two boxes be constructed upon entirely different theories.

6. Error is assigned because the verdict includes interest on the plaintiff's claim from the time of doing the work, which was in the latter part of May, 1885; and the charge authorized the inclusion of such interest in case the jury found for the plaintiff on all the issues. The precise point made is that the claim for extra work was for unliquidated damages, upon which no interest could be allowed. But there is evidence on the part of the plaintiff tending to show that, about the time of the completion of the work, he figured the lumber and the work, and that the defendant expressed himself satisfied with the lumber and the ice-box; that June 4, 1885, the plaintiff made out the bill upon which the suit was brought, and gave the defendant a copy of it, and the latter promised to pay it the next Saturday, June 6, 1885. If this was so, the plaintiff was entitled to interest from that time. This is substantially what was allowed.

By the Court.—The judgment of the county court is affirmed.

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GRAEVEN, Appellant, vs. DIEVES, Respondent.

February 5 — March 1, 1887.

Ejectment: Adverse possession.

K. purchased a strip of land twenty-five feet wide and erected thereon a building which extended a few inches upon the adjoining land. Subsequently he conveyed to G. by a deed describing the land as twenty-five feet. *Held*, that G. could have no benefit of K.'s adverse possession of the strip occupied by the building beyond the line of the land conveyed.

APPEAL from the Circuit Court for *Milwaukee* County.

Ejectment. The facts will sufficiently appear from the opinion. A motion for a nonsuit, made at the close of the plaintiff's testimony and renewed at the close of the testimony for the defendant, was granted, and from the judgment dismissing the complaint the plaintiff appeals.

For the appellant there were briefs signed by *Weil & Kleber* and *Weil & Killilea*, attorneys, and *D. S. Rose*, of counsel, and the cause was argued orally by *Mr. Rose*.

For the respondent there was a brief by *Austin, Runkel & Austin*, and oral argument by *Mr. R. N. Austin*. To the point that where the owner of lands, through ignorance, inadvertence or mistake, takes and holds possession beyond the true line, but with no intention of claiming further than his actual boundaries, such possession is not adverse, they cited *Brown v. Cockerell*, 33 Ala. 38; *Lincoln v. Edgecomb*, 31 Me. 345; *Worcester v. Lord*, 56 id. 265; *Dow v. McKenney*, 64 id. 138; *Ross v. Gould*, 5 id. 204; *Brown v. Gay*, 3 id. 126; 28 id. 481; 36 id. 507; 45 id. 384; 47 id. 337; 49 id. 118; 68 id. 84; 34 Iowa, 148; 54 id. 119; *Riley v. Griffin*, 16 Ga. 141; *Howard v. Reedy*, 29 id. 152; *Hamilton v. West*, 63 Mo. 93; *Winn v. Abeles*, 35 Kan. 85; *Hitchings v. Morrison*, 72 Me. 331; Sedgw. & W.

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on Trial of Tit. to Land, secs. 759, 760; Tiedeman on R. P. sec. 699.

COLE, C. J. It is not claimed or pretended that the plaintiff showed any paper title to the strip of land in controversy. The deed from Seligman to Kriege, and the one from Kriege and wife to the plaintiff, dated March 19, 1880, conveyed the west twenty-five feet of lots 1, 2, and 3, in block 102. The piece of land sought to be recovered lies outside of the premises described in these deeds, and is an irregular strip west of the west boundary line of such premises.— being eight inches wide on the north end, and four inches wide on the south end. The plaintiff attempted to prove title to this disputed strip by adverse possession. His contention is that the evidence clearly showed that he and his grantor, Kriege, had been in the adverse possession and occupancy of such strip, in hostility to every other claim of title, for more than twenty-six years before the commencement of the action,— consequently he established an indefeasible title to it under the statute. The provision relied on declares, in substance, that when there has been an actual continued occupation of any premises under claim of title exclusive of any other right, but not founded upon any written instrument or judgment or decree, the premises so actually occupied shall be deemed to be held adversely (sec. 4213, R. S.), and after twenty years of such possession the title shall be deemed to have ripened into a perfect title. This is the effect of the various provisions relating to this subject.

As we have said, there is no pretense that the plaintiff showed any paper title to the disputed strip, but he claims it by actual adverse possession under a claim of title for a sufficient period to bar the true owner. The evidence as to the occupancy of the strip under claim of title is exceedingly confused and obscure, and it is not easy to get at the mean-

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ing of the witnesses. The important testimony as to these facts is that of Kriege; and, if we understand it correctly, the effect of his statements may fairly be said to be this: In 1859 he purchased the west twenty-five feet of lots 1, 2, and 3, block 102, of Seligman, and went into possession. He occupied the property for twenty-one years. In 1880, he sold the property to the plaintiff and gave possession. The plaintiff has occupied it to the time of trial. When Kriege purchased the property, there was a frame building on a brick basement in front. There was a brick house in the rear. Kriege took down the old frame house, and built a new frame house in front on the old foundation that was on the west side. The defendant then occupied the adjoining property on the west. Kriege testified that the plaintiff "occupied the same property I had. I occupied four inches more on the west side. . . . All I know, he claims four inches more than I would. For the twenty-one years I lived there, I used the eight inches in controversy described in the complaint. I used it until I sold to *Mr. Graeven* in 1880, and *Graeven* occupies the same property now." On cross-examination the witness said: "I occupied under my deed twenty-five feet. I bought those twenty-five feet from Seligman,— the same premises described in the deed."

The plaintiff testified, and said: "I have occupied these premises since 1880. Kriege occupied them before me. I bought the premises of Kriege. He did not say there was anything wrong about them, and I occupied them. I have built the bake-oven, and attached the back building to it. I built the bake-oven on the same building. The wall between my property and *Mrs. Dieves* remained the same. *Mrs. Dieves* is in possession of the property west and adjoining mine. She is in possession of a small brick building adjoining my property on the west, which was built last year. It stands quite close to my building,— too near. The roof of that building hangs over my building at least four

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inches to my roof. The lower portion of that building stands quite close to my wall."

This is the material testimony as to the adverse possession. And this remark may be made upon it: that it is not clear from the evidence that even the possession of Kriege was adverse or hostile to the rights of the true owner. The object of the statute is to quiet titles and end disputes in regard to them. Hence, if the true owner acquiesces in the hostile acts and claims of the adverse possessor for the requisite period, the statute bars him. But where the possession is not hostile, but with the permission of and in subordination to the rights of the owner, there is no occasion for a controversy. Of course, there can be no adverse possession in such a case. Now, it is true Kriege occupied the building which was erected upon a foundation that extended a few inches west upon the defendant's premises. But whether this was by mistake as to the true boundary line, without any intent of claiming the strip as against the owner, is left in doubt. "To constitute adverse possession, entry must be made with defined claim of title and of possession, continued while the statute runs." *Pepper v. O'Dowd*, 39 Wis. 548. The adverse possession must be visible and notorious, and such as may fairly imply notice to the owner and acquiescence on his part. Proof of occupation and use by the adverse claimant for more than twenty years, when such occupation and use are consistent with the claim of ownership, may raise the presumption that the entry was under a claim of title exclusive of any other right. *Allen v. Allen*, 58 Wis. 206.

But, however the case might stand as to Kriege, and whatever might have been his intention as to claiming and holding beyond the true boundary line, it seems to us, upon the facts, that the plaintiff has entirely failed to prove title by adverse possession to the disputed strip. He seeks to have the benefit of the adverse possession of his grantor, who he

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claims had disseized and ousted the true owner. But the difficulty with this claim is that the deed under which the plaintiff acquired the property does not attempt to convey more than the west twenty-five feet of lots 1, 2, and 3. If Kriege, by adverse possession or otherwise, had acquired title to the disputed strip, he surely did not convey it by his deed. The rule is that "evidence of adverse possession is always to be construed strictly, and every presumption is to be made in favor of the true owner. Such possession is not to be made out by inference, but by clear and positive proof. This is the language of the authorities, and the rule is well settled." DIXON, C. J., in *Sydnor v. Palmer*, 29 Wis. 252. The presumption is that the plaintiff entered under his deed. The possession given him by his grantor was only co-extensive with his title, and was restricted to the premises granted. There are doubtless instances where the successive possessions of different occupants have been regarded as a single continued possession, but we do not see how that can be held as to the excess here. For the grant is limited to the west twenty-five feet, and conveys nothing beyond that. Upon what principle, then, under such a grant, can the plaintiff claim that he acquired some right to a strip outside the premises described in the deed? We see nothing in the case which will warrant such a claim. When Kriege quit the possession of the disputed strip, the seizin of the true owner was restored, and an entry afterwards by the plaintiff upon such strip constitutes a new disseizin; but under his deed he can claim no right to that piece of land founded upon the adverse possession of his grantor. He has only occupied the building erected on the wall, which extends on the defendant's premises, since 1880, and consequently has acquired no title by adverse possession. Upon the facts, the court was clearly right in nonsuiting the plaintiff and dismissing the complaint.

By the Court.—The judgment of the circuit court is affirmed.

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POPOSKEY, Appellant, vs. MUNKWITZ, Respondent.

February 5 — March 1, 1887.

Landlord and tenant: Breach of covenant for quiet enjoyment: Measure of damages.

1. One who executes a lease of a store, knowing that he cannot put the lessee in possession because another is in possession under a valid prior lease executed by himself and not yet expired, is liable to the second lessee for the whole loss proximately sustained by reason of the failure to put him in possession. But the latter should use all reasonable diligence to procure another suitable place in which to carry on his business.
2. In such a case, where the second lessee has advanced rent, and incurred expense in removing goods to such store, with the lessor's consent, and in taking them away again on his failure to obtain possession, he is entitled to recover, in an action for a breach of the covenant for quiet enjoyment, the amount of rent so advanced, with interest, and the expenses so incurred; and in addition thereto, if the lessor did not know the purposes for which the premises were hired, the difference between the rent reserved and the actual rental value of the premises; but, if the lessor did know for what they were hired, then the difference between the rent reserved and the rent which he would be compelled to pay for another store equally well adapted to his business, and the additional expense, if any, of removing his goods thereto; or, in case he could not procure another suitable store for his business, then all the damages proximately resulting to his business from the breach of covenant, the value of the lease being a part thereof.
3. In an action for the breach of a covenant for quiet enjoyment in a written lease, where it appears that the lessor knew at the time of its execution that he could not give possession because of the existence of a prior valid and unexpired lease to another lessee, parol evidence is admissible on the part of plaintiff to show that he was unable after reasonable diligence to procure another store suitable to his business, and, that being *prima facie* established, to show the value of his business, and the special damage thereto by loss of anticipated profits.
4. The giving of a lease of premises to take effect while they are in the actual possession of a prior lessee under a valid unexpired lease, does not necessarily operate as an assignment of the rent accruing under such prior lease, so as to preclude the second lessee from recovering from the lessor the rent advanced by him.

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APPEAL from the Circuit Court for *Milwaukee* County.

The action is by a lessee against his lessor for failure of the latter to give the lessee possession of the leased premises according to the covenants in the lease.

Under date of October 22, 1884, the parties executed an indenture of lease, in and by which the defendant leased to the plaintiff his store, No. 411 Broadway in the city of Milwaukee, from November 15, 1884, to May 1, 1890, at a yearly rent therein reserved, and therein covenanted that, on paying such rent and performing the conditions contained in such lease to be performed by him, the plaintiff should have the quiet and peaceful possession of the leased premises during such term. The defendant was unable to give the plaintiff the possession of the leased store because he had theretofore leased the same to Wilde & Uhlig for three years, commencing May 1, 1883, and Uhlig was lawfully in possession thereof under such lease when the plaintiff's term under his lease commenced, and so continued in possession thereafter. The plaintiff paid the defendant the rent until December 1, 1884, at the execution of the lease,—being $41.67,—as stipulated in the lease, and performed all his covenants therein contained. The plaintiff also put some goods in the store with the consent of the defendant, but was required by Uhlig to take them away. This involved an expenditure by the plaintiff of $14.40.

It is averred in the complaint that for twelve years before the making of the lease first above mentioned the plaintiff had carried on, in the city of Milwaukee, and for the last five years in the vicinity of the leased store, a wholesale and retail business in pictures, picture-frames, and artist's materials, and in manufacturing picture-frames, and had a very large and lucrative custom and patronage established in said business; that he leased the store No. 411 Broadway for the purpose of carrying on and continuing the same business therein, of which the defendant had no-

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tice; that such store was especially well located and adapted to the requirements of plaintiff's said business; that, relying upon having possession of the leased store at the stipulated time in which to carry on his business, he purchased a large stock of goods adapted to the holiday trade in December, which is the most profitable trade during the year; and that he lost this trade by reason of his failure to obtain possession of the store. Also that upon the refusal of defendant to give him possession of the store the plaintiff diligently endeavored, but without success, to obtain another store suited to the requirements of his business, and that the rental value of the leased store for the term of the lease is at least $2,000 more than the rent thereof reserved in the lease. The closing paragraph of the complaint is as follows: "That by reason of the premises plaintiff's said business has been broken up and destroyed, and his trade and custom gone, and his stock of goods purchased to carry on his business at said store so leased has become greatly depreciated and destroyed in value, and plaintiff has lost the profits which he would and could have made in continuing and carrying on his aforesaid business at said leased premises since said 15th day of November, 1884, had said leased premises been surrendered and delivered up to him as agreed by defendant, and his said leasehold interest in said premises been lost and destroyed, to the damage of plaintiff in the sum of $5,000." Judgment for $5,000 and costs is demanded.

The answer denies in detail each of the above averments, except that the defendant owned the store No. 411 Broadway, and executed a lease thereof to the plaintiff as alleged in the complaint.

The controversy on the trial was confined to the question of damages. The plaintiff offered testimony for the purpose of proving the special damages stated in the complaint, but the same was rejected, and the judge held that the measure of the plaintiff's damages is the difference be-

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tween the rent reserved in the lease and the actual rental value of the store, together with the expense of removing the plaintiff's goods (before mentioned) from the store after the term of the lease commenced, and confined the testimony to those elements of damages. Only a single question was submitted to the jury, which is as follows: "What was the actual value per annum of the premises 411 Broadway, Milwaukee, described in the lease from defendant to plaintiff, from and after November 15, 1884?" The jury answered $1,200. The rent reserved in the lease until May 1, 1887, is $1,000, and $1,200 thereafter.

On April 5, 1886, the court gave judgment for the plaintiff for $272.14 damages, and for costs of suit. It is recited in the order for judgment that the plaintiff admitted he went into possession of the leased store March 1, 1886. It is understood that the judgment is made up of $200 per annum (being the excess in the value of the rent as found by the jury, over and above the rent stipulated in the lease) from November 15, 1884, to March 1, 1886, and the item of $14.40 above mentioned. The item of $41.67 paid defendant on account of rent was disallowed for the reason (as stated by the court) that the lease to plaintiff "assigned, by operation of law, the premises during Uhlig's term to *Mr. Poposkey*, and he has the right to recover the rent from Mr. Uhlig." The plaintiff appeals from the judgment.

For the appellant there was a brief by *Dey & Friend*, and oral argument by *Mr. Dey*. As to the rule of damages in such cases, they cited 3 Suth. on Dam. 149–166; 2 Wait's Act. & Def. 463; *Pumpelly v. Phelps*, 40 N. Y. 59; *Mack v. Patchin*, 42 id. 167; *Eldred v. Leahy*, 31 Wis. 546; *Trull v. Granger*, 8 N. Y. 115; *Margraf v. Muir*, 57 id. 155; *Akerly v. Vilas*, 23 Wis. 207; *Townsend v. Nickerson Wharf Co.* 117 Mass. 501; *Cockburn v. Ashland Lumber Co.* 54 Wis. 619; *Hexter v. Knox*, 63 N. Y. 561; *Dobbins v. Duquid*, 65 Ill. 464; *Dexter v. Manley*, 4 Cush. 14; *Hinckley*

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v. Beckwith, 13 Wis. 31; *Allison v. Chandler*, 11 Mich. 542; *Chapman v. Kirby*, 49 Ill. 211; *Avan v. Frey*, 69 Ind. 91; *Schile v. Brokhahus*, 80 N. Y. 614; *Menard v. Stevens*, 44 N. Y. Super. Ct. 515; *Bagley v. Smith*, 10 N. Y. 489; *Goebel v. Hough*, 26 Minn. 252; *Shafer v. Wilson*, 44 Md. 268; *Fairchild v. Rogers*, 32 Minn. 269.

For the respondent there was a brief by *Jenkins, Winkler, Fish & Smith*, and oral argument by *Mr. Winkler*. As to the measure of damages, they cited *Kinney v. Watts*, 14 Wend. 38; *Blossom v. Knox*, 3 Pin. 262; *Messer v. Oestreich*, 52 Wis. 695. This case is distinguishable from *Akerly v. Vilas*, 23 Wis. 207, and kindred cases, in that there was no fraud on the part of the lessor, but he acted in good faith, believing the prior lease to be void. The appellant was not entitled to recover for injuries to his business or loss of anticipated profits. Not having given up or abandoned his lease, he could not recover back the rent advanced by him, since that operated as an assignment of the rent reserved in the prior lease. Woodfall's L. & T. (10th ed.), 167, 168; *Harmer v. Bean*, 3 Car. & K. 307; R. S. sec. 2194; *Winterfield v. Stauss*, 24 Wis. 403; *Doe ex dem. Agar v. Brown*, 2 Ellis & Black, 331; *Shepheard v. Beetham*, L. R. 6 Ch. Div. 600; *Purdy v. Rakestraw*, 13 Brad. 481; *Allen v. Webster*, 56 Ill. 393; *Dudley v. Lee*, 39 id. 339; *Ball v. Chadwick*, 46 id. 28; *Dobson v. Culpepper*, 23 Gratt. 352.

LYON, J. This action was brought to recover damages for the failure of the defendant to put the plaintiff in the possession of the store No. 411 Broadway, Milwaukee, leased by the former to the latter, at the time stipulated in the lease as the commencement of the term. It is substantially an action for a breach of the covenant for quiet enjoyment contained in the lease. 1 Tayl. Landl. & Ten. § 309. This appeal presents for determination the question, What is the true rule of damages for a breach of that covenant in

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that case, in view of the facts proved and offered to be proved therein?

The rule is undoubtedly the same as in an action for a breach of covenants for title in an absolute conveyance. That is to say, had the plaintiff purchased the store No. 411 Broadway of the defendant, and taken an absolute conveyance thereof instead of a lease for five or more years, under the same circumstances which existed when the lease was executed, the measure of his damages for a breach of the covenants for title in such conveyance would be the same that it is for a breach of the covenant for quiet enjoyment in the lease. 3 Suth. Dam. 147; *Blossom v. Knox*, 3 Pin. 262. Indeed, the covenant for quiet enjoyment is one of the covenants for title in a conveyance. Rawle, Cov. 17. It is also said to be "an assurance consequent upon a defective title." Id. 125.

The general rule of damages which obtains in England and many of our sister states for a breach of covenant for title was first authoritatively laid down in 1775, in the case in the common pleas of *Flureau v. Thornhill*, 2 W. Bl. 1078. The defendant covenanted to sell the plaintiff a rent for a term of years issuing out of leasehold premises, but, without fault on his part, the defendant was unable to make good title thereto. The plaintiff claimed damages for the loss of his bargain, but it was held that he was not entitled thereto. De Grey, C. J., said: "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." Blackstone, J., said: "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title." The rule of the above case has been much considered in both England and this country; and while its scope has been more clearly defined, and its application

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somewhat limited by later adjudications, the rule itself, as applied to cases in which the vendor honestly believed he had a good title but the title failed for some defect not known to him and of which he was not chargeable with notice, is now firmly established in the jurisprudence of England by the judgment of the House of Lords in *Bain v. Fothergill*, L. R. 7 Eng. & Ir. App. 158. As already observed, the rule prevails in several of the United States, including this state, under the limitations just mentioned of good faith and excusable ignorance of the vendor of defects in his title. Indeed, these are scarcely limitations but rather an interpretation of the qualification "without fraud," in the opinion by De Grey, C. J., in the principal case. The rule as it now stands has been applied in this state in *Rich v. Johnson*, 2 Pin. 88; *Blossom v. Knox*, 3 Pin. 262; *Nichol v. Alexander*, 28 Wis. 118; *Messer v. Oestreich*, 52 Wis. 684, and in other cases.

Under this or any other rule, the plaintiff is entitled to recover the consideration paid by him on account of the purchase. Hence, in the present case, whatever may be the measure of damages, the plaintiff should have recovered the amount he advanced for rent and interest thereon. The reason given by the circuit judge for excluding this amount from the plaintiff's recovery, to wit, that he could recover the rent from Uhlig, the tenant under the paramount lease, is conceived to be unsound. The plaintiff did not purchase a term subject to the lease of Uhlig, but an absolute term; and while he might perhaps have treated his lease as an assignment of the rents accruing under the prior lease, and collected the same from Uhlig, there is no rule of law which compels him to do so. Indeed, had he done so, it possibly might have operated as a waiver of any claim for damages for the breach of the covenant sued upon.

The limitations of the rule of *Flureau v. Thornhill*, or rather the exceptions thereto, are well stated in 3 Suth.

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Dam. 149, as follows: "Where a lessor knows, or is chargeable with notice, of such defect of his title that he cannot assure to his lessee quiet enjoyment for the term which such lessor assumes to grant; where he refuses, in violation of his agreement, to give a lease or possession pursuant to a lease, having the ability to fulfil, as well as where the lessor evicts his tenant,— he is chargeable with full damages for compensation, and the doctrine of *Flureau v. Thornhill* has no application. On this general proposition the authorities agree. In such cases the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term is considered the natural and proximate damages. Where the lessee is deprived of the possession and enjoyment under such circumstances, the lessor is either guilty of intentional wrong, or he has made the lease and assumed the obligation to assure the lessee's quiet enjoyment with a culpable ignorance of defects in his title, or on the chance of afterwards acquiring one. In neither case has he any claim to favorable consideration; and he is not excused, on the doctrine of *Flureau v. Thornhill*, from making good any loss which the lessee may suffer from being deprived of the demised premises for the whole or any part of the stipulated term." This quotation doubtless contains a correct statement of the law acted upon in all the states, as well in those which have adopted the rule in *Flureau v. Thornhill* as in those which have not.

We are clear that this case comes within the exception. When the defendant leased the store to the plaintiff, he knew that there was a valid paramount lease upon the premises, executed by himself to Wilde & Uhlig, having seventeen or eighteen months to run after the commencement of the plaintiff's term. There is no claim that the former lessees had forfeited their lease. Indeed, the defendant afterwards made an unsuccessful attempt to evict them by legal proceedings for an alleged breach of the

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covenants of their lease, occurring after the execution of the plaintiff's lease. But it was held there was no breach. *Munkwitz v. Uhlig*, 64 Wis. 380. These proceedings are in evidence. Hence the defendant knew, when he leased the store to the plaintiff, of a defect in his title which prevented him from assuring to the plaintiff the quiet enjoyment of the leased premises. He thus entered into the contract on the chance of being able afterwards to avoid in some way his lease to Wilde & Uhlig, but having no legal cause for avoiding it. These facts deprive him of the protection of the rule in *Flureau v. Thornhill*, and bring the lease within the rule above quoted from Sutherland. In other words, the case is thus brought within the general rule which prevails in actions for breaches of contracts, that the plaintiff shall recover the loss he has proximately sustained by reason of the breach.

But, in order to determine what elements of loss come within the general rule, it is necessary to apply other rules of law to the particular case. In the present case (perhaps in most cases) the rules laid down in the leading case of *Hadley v. Baxendale*, 9 Exch. 341, 26 Eng. L. & Eq. 398, which have many times been approved by this court, are sufficient. *Shepard v. Milwaukee G. L. Co.* 15 Wis. 318; *Hibbard v. W. U. Tel. Co.* 33 Wis. 558; *Candee v. W. U. Tel. Co.* 34 Wis. 471; *Walsh v. C., M. & St. P. R. Co.* 42 Wis. 30; *Hammer v. Schœnfelder*, 47 Wis. 455; *Brown v. C., M. & St. P. R. Co.* 54 Wis. 342; *Cockburn v. Ashland Lumber Co.* 54 Wis. 619; *McNamara v. Clintonville*, 62 Wis. 207; *Thomas, B. & W. Mfg. Co. v. W., St. L. & P. R. Co.* 62 Wis. 642; see, also, *Richardson v. Chynoweth*, 26 Wis. 656. See, also, a very learned and elaborate note on the rule in the principal case, in which a great number of cases are cited and discussed, in 1 Sedg. Dam. 218–239. These rules can best be stated by a quotation from the opinion in the principal case by ALDERSON, B. He says: "Where two

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parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

Another rule having its foundation in natural justice should here be stated. In any case of a breach of contract the party injured should use reasonable diligence and make all reasonable effort to reduce to a minimum the damages resulting from such breach. The necessary expenses incurred by him in so doing may be recovered in an action for such breach. This rule was early laid down by this court in *Bradley v. Denton*, 3 Wis. 557, and has been followed since. For a full statement of the rule, and refer-

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ences to numerous adjudications sustaining it, see 1 Suth. Dam. 148. Under this rule, when the plaintiff was informed that the defendant could not give him possession of the store as he had covenanted to do (which information was received by the plaintiff November 7th, being eight days before the commencement of his term), it became his duty to use all reasonable efforts to procure another suitable place in which to carry on his business, if the damages which otherwise would result from the breach of the defendant's covenant would be thereby diminished. We do not think, however, the plaintiff could be lawfully required to take another store out of the vicinity in which he was doing business when he took the lease from the defendant. By removing to a remote part of the city, he might and probably would, to some extent at least, have lost the good-will of his business, which it is alleged he had carried on successfully for a series of years in the vicinity of the store No. 411 Broadway. Neither was he required to take another store not reasonably well adapted to his business.

From the foregoing rules, and the partial application of them already suggested, we think the following propositions are established:

(1) The plaintiff is entitled to recover the sum he paid as rent when the lease was executed, and interest thereon; and also the necessary expense of removing some of his goods to the store, with defendant's consent, and taking them therefrom after he failed to get possession of the store.

(2) If the defendant did not know, when he executed the lease, the purposes for which the plaintiff hired the store or the uses to which he intended to put it, the measure of the plaintiff's damages for breach of the covenant for quiet enjoyment (in addition to the special damages just mentioned) would be that adopted by the trial judge; that is, the difference between the rent reserved in the lease and the actual rental value of the store without regard to what

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it is used for, which the jury found to be $200 per annum. All these are natural and proximate damages resulting from the breach.

(3) If the defendant then knew that the plaintiff was carrying on the business stated in the complaint and hired the store No. 411 Broadway for the purpose of continuing the same business therein, and if, in the exercise of reasonable diligence, the plaintiff might have procured another store, reasonably well adapted to his said business and in the same vicinity, that is, in a location in which he could have preserved and retained substantially the good-will of his former business, the rule of damages, in addition to the special items first above mentioned, will be the difference between the rent reserved in the lease and the actual rental value of the leased store for the purpose of carrying on such business therein. In such case the actual rental value would ordinarily be measured by the amount of rent the plaintiff would be compelled to pay for another store equally well adapted to his business. If he could obtain another store for the same rent he was to pay the defendant, or less, of course he would suffer no general damages for the defendant's breach of covenant, and his recovery in that behalf would be confined to nominal damages, in addition to the special damages first above mentioned. If, however, the expenses of removing to another store would have been greater than they would have been in removing to the store No. 411 Broadway, such excess would also be a proper item of damages.

(4) If the plaintiff could reasonably have procured another suitable store for his business, he cannot recover for damages to his business, because, by leasing and continuing his business in such other store, he might have avoided such damages.

(5) But knowing that the plaintiff hired the store for the purpose of continuing his former business therein (if he did

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know it), and having executed the lease with knowledge that he could not put the plaintiff in possession of the store at the stipulated time because of his prior outstanding lease, the defendant took the risk of the plaintiff being able to procure another suitable store for his business. The inability of the latter to do so would render the defendant liable for the damages resulting to plaintiff's business by reason of the breach of covenant complained of. This is plainly within the rule of *Hadley v. Baxendale, supra*, because, under such circumstances, the parties may fairly be considered to have contemplated that the breach of the covenant would necessarily destroy or greatly impair the value of plaintiff's business. It should be observed that if the plaintiff recovers for damages to his business, he cannot also recover the value of his lease under the above second or third proposition, because such value is necessarily a factor in estimating the damages to the business. *Smith v. Wunderlich*, 70 Ill. 426, 433. He may, however, in that case, recover the special damages mentioned in the first proposition, for these are not such factors.

It follows that the testimony which was offered by the plaintiff to show that the defendant knew, when he executed the lease to the plaintiff, that the latter was carrying on the business before mentioned in the same vicinity and took the lease of the store for the purpose and with the intention of continuing such business therein, and that he was unable, in the exercise of due diligence, to find another store suitable for his business, was competent and should have been received. Further, after the plaintiff makes a *prima facie* case entitling him to recover for damages to his business, proof should be received, under the pleadings, to show the value of such business.

We agree with Mr. Justice PAINE, in *Shepard v. Milwaukee G. L. Co.* 15 Wis. 318, that to ascertain the value of a business an inquiry as to the profits thereof is necessary.

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Probably *value* and *net profits* are convertible terms as applied to a business. Yet the law in many cases gives damages for breaches of contracts, based on prospective profits, when they are fairly within the contemplation of the parties, are not too remote and conjectural, and are susceptible of being ascertained with reasonable certainty. If the plaintiff shows himself entitled to recover for damages to his business, the character, extent, and value of his established business when the lease was executed and before, will furnish a guide to the jury in assessing the prospective and probable value thereof had the plaintiff been permitted to transfer it to the store No. 411 Broadway. Carried on in the immediate vicinity of the old stand, and by the same person, presumably the business would have been equally prosperous. This presumption may be rebutted by proof of facts and circumstances tending to show that the business would probably have been less remunerative had it been so continued.

It was said in argument that no case can be found which gives damages for the loss of anticipated profits, because a landlord fails to give possession at the time agreed upon. This is scarcely a correct statement. The case of *Ward v. Smith*, 11 Price, 19, cited by Mr. Justice PAINE in *Shepard v. Milwaukee G. L. Co. supra*, seems to be just such a case. It is conceded that if the plaintiff had not a business already built up and established in the same vicinity, which, with its good-will, could have been transferred to the store No. 411 Broadway, there would be no basis upon which to estimate the prospective value of the business which the plaintiff would have done there had he obtained possession and carried on the business therein. In such case, profits would probably be too conjectural and uncertain to be the basis of a recovery. Some of the cases refer to this distinction. In *Chapman v. Kirby*, 49 Ill. 211, the court, in speaking of the case of *Green v. Williams*, 45 Ill. 206, say:

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"In that case the lessee had not entered upon the term, had not built up or established a business, and had not suffered such a loss. There was not in that case any basis upon which to determine whether there ever would be any profits, or upon which to estimate them." In the present case the offer was to prove facts which would have shown a sufficient basis to determine whether there would be profits, and upon which they might be estimated.

For the errors above indicated, the judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

By the Court.—It is so ordered.

MEISSNER, Respondent, vs. MEISSNER, Intervener, Appellant.
BRESLAUER, Respondent, vs. SAME, Appellant.

February 5 — March 1, 1887.

DEBTOR AND CREDITOR. *(1) Creditors' bill: Intervention, when sustained. (2) Waiver of right to intervene.*

1. To entitle one creditor to reach, by petition in the nature of a creditors' bill in equity, money in the hands of the court apparently belonging to another creditor of the common debtor, the petitioner must show that he has exhausted his remedy at law against the debtor, or that he has a specific lien upon the money by virtue of an attachment or execution levied upon the same or upon the property from the sale of which the fund arose.
2. An allegation in such petition that the petitioner was induced not to intervene with other creditors in a former proceeding against the same fund, by a promise of the creditor to whom such fund apparently belonged that if the intervening creditors should succeed the balance of the fund after paying them should be applied upon the petitioner's judgment, shows a waiver of the petitioner's right to intervene, and is a sufficient ground for dismissing the petition.

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APPEAL from the County Court of *Milwaukee* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

In August, 1884, *Bertha Meissner* and *Joseph Breslauer* obtained two judgments against Max Meissner. These judgments were obtained in the county court of Milwaukee county. Executions were issued upon both these judgments and placed in the hands of the sheriff of Milwaukee county, and by virtue of such executions said sheriff seized a stock of goods belonging to said Max Meissner. After the seizure of such stock of goods by said sheriff, and before he had made sale of the same on said executions, A. B. Geilfuss, as receiver of the Manufacturers' Bank of Milwaukee, obtained a judgment against said Max Meissner, and caused an execution to be issued thereon. He also commenced an action against the said Max Meissner, and George P. Gore commenced another action against said Max Meissner, and in each of said last-named actions attachments were duly issued against the property of said Max Meissner, which said execution and attachments were placed in the hands of said sheriff with directions to levy upon and attach the same goods seized upon the executions issued upon the first-named judgments in favor of *Bertha Meissner* and *Joseph Breslauer;* the plaintiffs, Geilfuss and Gore, in said last-named judgments and actions, claiming that the judgments in favor of the said *Bertha Meissner* and *Joseph Breslauer* were fraudulent and void as to the creditors of said Max Meissner, and especially as to the plaintiffs in said last-named actions.

The sheriff sold the said stock of goods upon the executions in favor of *Bertha Meissner* and *Joseph Breslauer;* and the said sheriff, having been notified by Geilfuss and Gore that they claimed the proceeds of said sales on their execution and attachments on the ground that said judgments in favor of *Bertha Meissner* and *Joseph Breslauer* were fraud-

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ulent and void as to the creditors of said Max Meissner, instead of paying over the money received upon said sale to said *Bertha Meissner* and *Joseph Breslauer*, paid the money into the county court, subject to the order of said court. Afterwards judgments were duly obtained in said two actions in which said attachments were issued as aforesaid. On the 1st day of October, 1884, the said Geilfuss and the said Gore presented to the said county court a petition setting forth the facts above stated and other facts tending to show that the said judgments in favor of the said *Bertha Meissner* and *Joseph Breslauer* were fraudulent and void as to the creditors of the said Max Meissner, and especially as to the petitioners, and prayed that the said county court make an order directing the payment of the said judgments of said petitioners out of the moneys arising from the sale of the stock of goods of the said Max Meissner upon the executions issued upon the said judgments of the said *Bertha Meissner* and *Joseph Breslauer*. The facts stated in said petition were denied by the said *Bertha Meissner* and *Joseph Breslauer*, and thereupon the said county court directed issues to be formed upon said petitions and the answers thereto, and such issues were formed and tried by said court and a jury, and, after the trial of said issues, the said county court, on the 5th day of December, 1885, made a final order and judgment upon the claim of said petitioners, adjudging that the said judgments in favor of *Bertha Meissner* and *Joseph Breslauer* were fraudulent and void as to the creditors of the said Max Meissner, and particularly as to the petitioning creditors, Geilfuss and Gore, and further ordered and adjudged as follows:

"And, further, it is ordered that out of said fund, to wit, the sum of $1,879.86, the clerk of this court is directed to pay — *First*, to Albert B. Geilfuss, receiver of the Manufacturers' Bank of Milwaukee, and George P. Gore, or their attorneys, their costs of these proceedings in said two above-

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entitled actions, to be taxed according to law and the rules of this court; *second*, to Albert B. Geilfuss, receiver of the Manufacturers' Bank of Milwaukee, or to his attorneys, the amount due upon the judgment by him recovered against the defendant, said Max Meissner, in the circuit court of Milwaukee county, on August 21, 1884, for $463.89 damages and costs; *third*, to Albert B. Geilfuss, receiver of the Manufacturers' Bank of Milwaukee, or to his attorneys, the amount due upon the judgment by him recovered against the said defendant, Max Meissner, and entered on November 28, 1885, for $472.95 damages and costs, in the action in this court wherein an attachment was issued against said defendant's property on August 21, 1884; *fourth*, to George P. Gore, or to his attorneys, the amount due upon the judgment by him recovered against the defendant, Max Meissner, and which was entered on November 28, 1885, for $417.87 damages and costs, in the action in this court wherein an attachment was issued against said defendant's property on August 30, 1884; *lastly*, that the residue of said fund, if any there be, the said clerk shall pay in equal shares to the said *Bertha Meissner* and the said *Joseph Breslauer*, or to their respective attorneys."

From this order and judgment the said *Bertha Meissner* and *Joseph Breslauer* appealed to this court, and upon the hearing of said appeal the said order and judgment of the county court was in all things affirmed. See 65 Wis. 377. After the record was remitted to the said county court, and on the 27th of May, 1886, the said *Bertha Meissner* and *Joseph Breslauer* obtained an order from the said county court, of which the following is a copy: "[Title of cause.] Founded on the files, records, and proceedings in above suit. And on motion of E. P. Smith, attorney for the plaintiff, let the above-named intervening creditors and the sheriff of this county show cause, if any they have, before this court, on the 29th day of May, 1886, at the opening of the court

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on that day, or as soon thereafter as counsel can be heard, why the balance of the money specified in the order of November 5, 1885, should not be paid to the above-named plaintiffs, *Bertha Meissner* and *Joseph Breslauer*, in equal shares, and their bond and bondsmen should not be discharged. Let a copy of this order be served on the attorneys for the said creditors and the said sheriff at least twenty-four hours before said hearing."

The court directed this order to be served on the said Geilfuss and Gore, the intervening creditors, and upon the sheriff. At this point in the proceedings the appellant in the case at bar, *Moritz Meissner*, first makes his appearance as a claimant for the money arising from the sale of said stock of goods upon said executions of said *Bertha Meissner* and *Joseph Breslauer*, and he presents a petition to said county court setting forth that he is a judgment creditor of said Max Meissner upon a judgment rendered on the 13th day of September, 1884, for the sum of $867.68; also setting forth the proceedings had in said county court on the intervention of the said Geilfuss and Gore, and claiming that said judgments of said *Bertha Meissner* and *Joseph Breslauer* are fraudulent and void as to said petitioner, and praying that the remainder of said fund in the custody of the said county court, after paying the judgments of the said Geilfuss and Gore, be paid over to the petitioner in part satisfaction of his judgment against said Max Meissner, instead of being paid over to the said *Bertha Meissner* and *Joseph Breslauer* as directed in said original order and judgment, and praying that said original order be modified so as to direct the residue of said fund to be paid to the said *Bertha* and *Joseph* "if there are no intervening creditors;" and also praying "that issues be framed between the petitioner and the said *Bertha* and *Joseph* to try the *bona fides* or the good faith of the judgments of the said *Joseph Breslauer* and *Bertha Meissner* as against the peti-

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tioner." The appellant further states in his petition that there was an agreement between said petitioner and the said *Bertha Meissner* and *Joseph Breslauer* "in order to avoid costs and expenses, that in case the intervening creditors [meaning Geilfuss and Gore] should be successful, the balance of the money in the hands of the clerk, whatever the sum may be, shall be applied toward the payment of the judgment of the petitioner." All the material facts stated in the petition were denied under oath by the said *Bertha Meissner*, *Joseph Breslauer*, and A. Breslauer. Upon the hearing of the order to show cause, and upon the petition of the said *Moritz Meissner* and the denial of the matters stated in said petition, the said county court denied the application of the said petitioner, and ordered the residue of said fund to be paid over to the said *Bertha Meissner* and *Joseph Breslauer*, as ordered in said original order and judgment of said court. From this order the said *Moritz Meissner* appeals to this court.

For the appellant there was a brief by *M. N. Lando*, attorney, and *J. V. V. Platto*, of counsel, and oral argument by *Mr. Lando*.

For the respondents the cause was submitted on the brief of *E. P. Smith* and *Nath. Pereles & Sons*. To the point that the appellant had no standing in a court of equity because he had never obtained any lien under his judgment on the property in the hands of the sheriff, they cited *McDonald v. Allen*, 37 Wis. 108; *Allen v. Beekman*, 42 id. 185; *Breslauer v. Geilfuss*, 65 id. 377; *Nassauer v. Techner*, id. 388–391; *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Weil v. Lankins*, 3 Neb. 384; *Tennent v. Battey*, 18 Kan. 324; *Hall v. Striker*, 29 Barb. 105; *McMinn v. Whelan*, 27 Cal. 300.

TAYLOR, J. The *status* of this case seems to be as follows: The respondents have judgments against Max Meiss-

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ner, upon which executions have been issued, and the property of Max Meissner has been sold upon such executions, and the money paid into court, where it was held subject to a litigation between said respondents and some of the creditors of Max Meissner. On the termination of such litigation a part of the money received upon such execution sale was paid to the other litigating creditors, and the balance was ordered to be paid over to the respondents. The appellant in the mean time has obtained a judgment against the said Max Meissner, and he now makes a motion to the court where said money is deposited to have the part heretofore ordered to be paid to said respondents paid over to him—*first*, on the claim that the judgments in favor of the said respondents are fraudulent and void as to the petitioner; and, *second*, upon the ground of an existing agreement between the petitioner and the respondents that it should be paid to him in case the former intervening creditors were successful in their litigation. The petition does not show that any execution has ever been issued on the judgment of the petitioner.

We think the petition of the appellant was properly denied, upon several grounds: *First*, he had no lien, by attachment or execution, upon the fund in the hands of the court; *second*, not having had an execution issued upon his judgment and returned unsatisfied, he has no standing in equity to have the fund applied to the payment of his judgment or to contest the validity of the judgments of the respondents; and, *third*, he had obtained his judgment in time to have intervened with the other intervening creditors and had his right protected in that proceeding, and neglected to do so.

If this proceeding can be maintained at all, it must be upon equitable grounds and as being a proceeding in equity to subject the property of a debtor, in the hands of his fraudulent grantee or assignee, to the payment of his debts.

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It has been a long-established rule in this court, as in most courts, that a creditor cannot maintain such equitable action as a general creditor of the debtor, but must first procure a judgment against the debtor and exhaust his remedy upon such judgment by the issue and return of an execution unsatisfied, before he can maintain an action in equity to reach the property of the debtor which has been fraudulently conveyed. See *Montague v. Horton*, 12 Wis. 599, 606; *Hyde v. Chapman*, 33 Wis. 391, 399, 400; *Williams v. Sexton*, 19 Wis. 42; *Gates v. Boomer*, 17 Wis. 455; *Cornell v. Radway*, 22 Wis. 260. These cases make it certain that the appellant, upon the facts stated, could not maintain a creditors' bill to reach the money in question. And if a proceeding by petition and by motion of one creditor to reach money in the hands of a court, apparently belonging to another creditor of a common debtor, may take the place of a creditors' action, we are of the opinion that the petitioning creditor must show that he has exhausted his remedy at law against the common debtor, or he must show a specific lien upon the particular property or money sought to be reached, either by an attachment or execution levied upon the same or upon the property from the sale of which the fund has arisen, as was done in this case upon the intervention of the creditors of Geilfuss and Gore. This proceeding is neither a proceeding in aid of an execution, nor supplementary to an execution, nor a garnishment under the statute, and must therefore be sustained, if sustained at all, as a proceeding in the nature of a creditors' action in equity, and as such action the petition fails to state facts sufficient to sustain it. See sec. 3029, R. S. 1878.

The fact that the petition alleges that the petitioner was induced not to take steps to intervene as a creditor with the intervening creditors, Geilfuss and Gore, and have his rights determined in that proceeding, upon the strength of a promise made by the respondents that the balance of

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the fund should be applied on his judgment if the intervening creditors succeeded, is a sufficient reason to justify the court in dismissing the petition, even if the petitioner had shown himself to have been otherwise entitled to be heard. He must by that act be held to have waived his right to intervene for this money in the hands of the court. If his statement in this regard be true, it is probable that the petitioner could maintain an action upon such promise, and protect himself in that way, and so render this equitable proceeding unnecessary.

We think that, upon all the facts appearing in the record, there was no error on the part of the county court in refusing to grant the prayer of the petitioner.

By the Court.—The order of the county court appealed from is affirmed.

TREAT and another, Appellants, vs. HILES, Respondent.

February 5 — March 1, 1887.

Contracts: Partnership: Statute of frauds.

1. An agreement that A. shall procure the conveyance to B. of lands belonging to a third person, upon which A. has discovered a valuable quarry, that B. shall pay for such land, and that thereafter they shall open and work the quarry together and share the profits equally, is either an agreement for a copartnership or an agreement of copartnership, and for a breach thereof by B., A. may maintain an action for damages.
2. Such a contract is not within the statute of frauds (sec. 2302, R. S.), as being for any interest in lands, nor (sec. 2307) as being by its terms not to be performed within one year.

APPEAL from the Circuit Court for *Milwaukee* County.

This case is sufficiently stated in the opinion. The defendants appealed from an order overruling a general demurrer to the complaint.

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N. S. Murphey, for the appellants, argued, among other things, that the contract set out in the complaint was in effect an agreement for copartnership in the operation of the quarry, and if executed would convey no interest in land, but only an interest in the profits of working the quarry. Story on Part. 34, 53–60, 220, 42, 48; *Brigham v. Dana*, 29 Vt. 9; *Smith v. Wright*, 5 Sandf. 113; *Rosenfield v. Haight*, 53 Wis. 260; *Whitney v. Ludington*, 17 id. 140; *Upham v. Hewitt*, 42 id. 85; *Leggett v. Hyde*, 58 N. Y. 272; 1 Pars. on Cont. 166; *Reid v. Hollinshead*, 4 B. & C. 867; *Smith v. Watson*, 2 id. 401; *Heran v. Hall*, 1 B. Mon. 159; *Berthold v. Goldsmith*, 24 How. 536; *Gilbank v. Stephenson*, 31 Wis. 592; *Grant v. Hardy*, 33 id. 668; 3 Parsons on Cont. 39; *Houston v. Laffee*, 46 N. H. 507; *N. O., J. & G. N. R. Co. v. Moye*, 39 Miss. 374; *Coleman v. Eyre*, 45 N. Y. 38; *Brockett v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 id. 549; *Remington v. Palmer*, 62 N. Y. 31; *Thomas v. Dickinson*, 12 id. 364; *Thayer v. Vilas*, 23 Vt. 494; *Nutting v. Dickinson*, 8 Allen, 540. The contract was not such that it could not be performed within a year, and it was therefore not void under sec. 2307, R. S. The quarry might be exhausted or one of the parties might die within the year. 3 Parsons on Cont. 35, 36, and note; *Rogers v. Brightman*, 10 Wis. 63; *McClellan v. Sanford*, 26 id. 609; *Jilson v. Gilbert*, id. 637; *White v. Hanchett*, 21 id. 415; *Murray v. Abbot*, 61 id. 198; *Heath v. Heath*, 31 id. 223. The contract has been entirely executed so far as the appellants are concerned, and thereby validated, and this action may therefore be maintained as if the original agreement had been in writing. 3 Parsons on Cont. 37–38; *Sheehy v. Adarene*, 41 Vt. 541; *Coyle v. Davis*, 20 Wis. 564; *McClellan v. Sanford*, 26 id. 609. Contracts of partnership may be formed by parol for a long or indefinite period of time. Story on Part. sec. 86. And a parol contract of partnership to deal in lands is not within the statute. *Chester v. Dickerson*, 54 N.

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Y. 1; *Williams v. Gillies*, 75 id. 197; *Hirbour v. Reeding*, 3 Montana, 15. This action is for the violation of an agreement *to enter into a contract* of partnership, and that agreement was to be executed within a year. *Hill v. Palmer*, 56 Wis. 123; Browne on Stat. of Frauds (4th ed.), sec. 291*a*; *M'Kay v. Rutherford*, 13 Jur. 21; *Hoare v. Hindley*, 49 Cal. 274.

For the respondent the cause was submitted on the brief of *John W. Cary*. He contended, *inter alia*, that the contract set out in the complaint is void under secs. 2302, 2304, R. S. The complaint expressly states that the plaintiffs by the transaction acquired an interest in the land, that is, that the defendant took the title in trust for the benefit of himself and the plaintiffs. *Daniels v. Bailey*, 43 Wis. 566; *Tillie v. Dunbar*, 62 id. 198; *Young v. Lego*, 36 id. 394; *Warner v. Trow*, id. 195; *Clark v. Davidson*, 53 id. 317. The contract was void under sec. 2307, R. S. If the quarry was inexhaustible, as alleged, and was to be worked under this contract so long as it might last, the contract certainly could not be performed within a year. The whole scope of it shows that the intention of the parties was that it should continue for a great number of years. 3 Parsons on Cont. 35, note *g*; *Cohen v. Stein*, 61 Wis. 508.

Orton, J. The complaint states substantially the following facts: The plaintiffs, by their superior scientific knowledge, diligence, observation, and skill, had discovered a very valuable stone quarry on certain lands of William and Lyman Saunders, in Waukesha county, Wisconsin, of which said owners were ignorant; and, wishing to engage some person of abundant means with them in the scheme of making said quarry available to themselves, as well as to such person, by large profits on the investment, they communicated their information of said quarry to the defendant, he being such a person of large means and well suited to such

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an enterprise; and they entered into a verbal contract with him that they should negotiate the purchase of said land for not exceeding $12,000, to be paid by the defendant, and procure a deed of said land to him, and that thereafter they, together with the defendant, should forthwith proceed to open and work the said stone quarry, by quarrying, removing, and selling the said stone, for profit, the defendant to advance the necessary money to carry on said business, and the plaintiffs to give and bestow their exclusive time, labor, and services for that purpose, and that the net profits of so opening, working, and developing said stone quarry, and so selling the said stone, should be equally divided between them, that is, one half to go the plaintiffs and one half to the defendant. The plaintiffs, in pursuance of said verbal contract, on the 28th day of September, 1885, by the employment of much of their time, labor, and money, negotiated said purchase for said sum of $12,000, and procured a deed of said lands to be executed and delivered to the defendant, and on the 1st day of October thereafter, they, together with the defendant, employed a foreman for said works, and the plaintiffs purchased tools therefor with the moneys advanced by the defendant for that purpose, and they were shipped to said quarry, and preparations were made to commence said works, and the plaintiffs were ready to perform said contract and commence and prosecute said business on the terms aforesaid with the defendant. The defendant, however, very soon thereafter refused to allow the plaintiffs to bestow any labor, services, or attention to the opening, developing, or working said stone quarry, or to divide any profits therefrom, and utterly refused to commence said works with the plaintiffs in pursuance of said contract, although they were willing and ready to do as they had so agreed to do on their part, and the defendant notified said plaintiffs that they could have no further interest in said works or business or the profits

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thereof. The defendant thereupon took exclusive possession of said quarry, and commenced opening, working, and developing the same, and selling stone therefrom, to the exclusion of the plaintiffs from said works and the profits thereof. There are proper allegations of a valuable consideration to said contract, and of a breach thereof by the defendant. The stone quarry was supposed to be very extensive and valuable, and stone of the quality found therein was worth in market four dollars per cord, deducting all costs and expenses, which would have yielded to the plaintiffs a very large sum as their share of the net profits of said works had the defendant allowed them to perform said contract, and performed the same on his part. The prayer is for damages for the breach of said contract by the defendant by his refusal to allow the plaintiffs to enter upon and carry out said joint enterprise with him, commensurate with their share of said profits.

A general demurrer to said complaint was sustained by the circuit court, and from the order sustaining the same this appeal is taken.

The above is believed to be a substantially correct statement of the facts alleged in the complaint, although much briefer than the complaint itself.

Before entering upon the consideration of the important questions raised and argued in this court upon the demurrer, as to the validity of the contract in view of the statute of frauds, it may be proper to determine the nature of this action, and to classify, if we may, the contract set out in the complaint. On that subject we have the benefit of a recent decision of this court in *Hill v. Palmer*, 56 Wis. 123, in which the facts were very closely like those in this case, so far as that matter is concerned. In that case a similar contract was made between three persons for cutting, hauling, banking, and running logs to be taken from land belonging to another person. It was agreed that one of them should

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procure the right to so cut logs upon said land for the benefit of all three, and that thereupon they should commence said works, which should be for their joint benefit and equal profits. The right to cut on said land was procured by such one of them according to the contract, and the other two were ready, with tools, teams, supplies, and camping outfit, to commence upon said works, whereupon they were notified by such other person that he would not go on any further with the contract, or with them in said works, and he entered upon said works alone and on his own account, to the exclusion of the other two, and availed himself of the benefit of the right to cut logs on said land procured by him for the benefit of all of them jointly, and went on and made large profits, for which the other two brought suit as damages for breach of the contract, as in this case. The striking similarity of the cases appears also in the fact that the plaintiffs had, by their prospecting and exploration, discovered and estimated the pine timber on said land, and by their own skill, labor, and superior knowledge, and communicated their discovery to the defendant as an inducement for him to enter into the contract with them. This court determined in that case that the contract was one to enter into an agreement for a copartnership, or to enter upon the business of a copartnership already formed, which had not been commenced, and that therefore an action at law would lie for the breach of the contract. This decision was sustained by the citation of numerous authorities. (1) Then the contract here set out is either one for a copartnership, or of copartnership not yet practically commenced; and (2) this action at law for damages is properly brought. A bill in equity to close up a partnership, or to dissolve it, or for an accounting, would be fruitless, because it had not entered upon business and had made no profits or accumulated any property. It is proper to say that no objection to the form of the action was taken in this

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case by the learned counsel of the respondent, but he declined to notice the argument of opposite counsel relative to the questions of partnership, as he claimed they had no relation to the issue.

The important questions in this case, and which were very ably discussed by the learned and distinguished counsel on both sides, are whether this contract is for any interest in lands, in violation of the statute of frauds in sec. 2302, R. S., or by its terms is not to be performed within one year, in violation of sec. 2307, R. S. These questions will be disposed of in their order.

The first question, as to whether this contract is for any interest in the land so purchased by the defendant, upon which the stone quarry is situated, is not very clear or readily answered without a very full examination of the authorities and a critical understanding of the terms, purposes, and relation of the contract to the said lands. I confess that it appeared to me at first blush that the contract does create an interest in said land, or convey some interest therein to all of the parties, or to the plaintiffs, or to the copartnership; but, upon further and much thought and a full investigation of the subject in the light of the authorities, it appears perfectly clear that it does not, and that the contract is not within the statute. Neither the contract nor the partnership concerns anything except the mere *working of a stone quarry* on the land of one of the partners, and the selling of the stone and the profits of the business. It does not convey the stone in the quarry, or any part of it. The quarry remains the property of the defendant, or the owner of the land, all of the time, and the stone severed from the freehold by the joint labor of the parties only becomes the property of the partnership, to be sold for a profit to be equally divided. The contract contains a license to the plaintiffs to go upon the land of the defendant and work the quarry, either as a mere verbal license

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which, while it exists, will justify the entry for such purpose, or a right to so work by the authority and in the right of the defendant as one of the copartners. In either case there is no interest in the land itself involved. It may be that such license could be revoked by the defendant at any time, but such revocation would involve a breach of the partnership contract, for which damages could be recovered as in this case.

The same principles exist in all mining contracts when the mere working of a mine is the subject of the contract, and no interest in the mine itself is at all affected. This interest, as we shall see, is represented by the shares of stock of a company that has the mere right to work a mine. Such shares represent no interest in the mine itself or the land, but the mere interest in the net profits. The shareholder is entitled to his dividend, which consists of his share of the net profits of the enterprise.

With these preliminary observations, we will notice some of the authorities sustaining these views. In *Gillett v. Treganza*, 6 Wis. 343, the contract conveyed the right *to dig on a certain range for lead ore*, or, as the present chief justice said in his opinion, "*to work or search for*" lead ore on the land of one of the parties. The language in this contract is "to *open*, *develop*, *and work* the said *stone quarry*," and again, "by *quarrying*, *removing*, and *selling* the said stone." There is absolutely no difference. It is said in the opinion: "Instead, therefore, of parting with, granting, and conveying all the mines and lead ore that were then existing within the land, the words of the agreement import nothing more than a right or license or privilege to search and get these minerals." And again: "But the plain object and intent of this agreement appears to be, not to create a property or estate in the land, not to sell the mines or mineral unsevered therein, but to sell a right, liberty, license, and privilege to *work*, *mine*, and *search for*

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lead ore upon the range therein described." It is intimated in the opinion that such a license was probably irrevocable if the mining was prosecuted with diligence. This case would seem to be sufficient authority. But, lest its perfect applicability may be questioned, we will look further into the authorities.

The mere right to work a quarry or a mine is not exclusive of the grantor, and conveys no interest in the quarry or mine or the land. Coll. Mines, §§ 1, 5, 9; Co. Litt. 42*a;* 2 Bl. Comm. 121; *Brewer v. Hill*, 2 Anstr. 413; *Hewlins v. Shippam*, 5 Barn. & C. 229. A verbal agreement to share profit and loss in the working of a colliery is not within the statute. *Forster v. Hale*, 5 Ves. Jr. 314; *Watson v. Spratley*, 10 Exch. 222. Those having a right to search for and dig ore on another's land divided their interest into shares. It was held that such shares may be conveyed by parol. *Hanley v. Wood*, 2 Barn. & Ald. 724. The liberty to dig tin and other metals on another's land is a mere license, and conveys no interest in the land. *Hayter v. Tucker*, 4 Kay & J. 249. Shareholders are only interested in the profits of *working* the mine, and have no interest in the *realty*. *Powell v. Jessopp*, 18 C. B. 336; *Walker v. Bartlett*, 18 C. B. 845. In *Hills v. Parker*, 7 Jur. (N. S.), 833, a person holding a leasehold interest in salt-works formed a partnership with others to work the wells and make salt. It was held that the partnership had no interest in the estate. In *Burdon v. Barkus*, 3 Giff. 412, the lessee of a coal mine took in a partner to work it for iron-stone and fire-clay. It was held that he could terminate the partnership at his pleasure, because he was alone interested in the lease. In *Dale v. Hamilton*, 2 Phil. 266, C. purchased the land for A. and B., and they entered into partnership with C., and it was agreed that C. should survey and plat the land into lots, and do other work, and try and sell the lots, and, when sold, the profits should be divided between them. It was

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held that no interest in the land passed to C. by the contract. A mere parol license to dig a well on another's land, and carry the water in pipes to his own land, conveys no interest in the land. *Houston v. Laffee*, 46 N. H. 507. If one agrees with the owner of the land to get a railroad located and constructed on it, and to lay it off into lots and make sales, in consideration of half of the profits above cost, he obtains no interest in the land. *Lesley v. Rosson*, 39 Miss. 368. "A colliery and a landed estate are considered quite different by the courts; a colliery being always considered as a *trade*, the profits of which accruing from day to day belonging to those who work it for the profits thereof." *Steward v. Blakeway*, L. R. 4 Ch. App. 603. "Real estate not purchased by partnership funds, although used for partnership purposes, does not become partnership property, and the title is not affected by such use." *Alexander v. Kimbro*, 49 Miss. 529; *Frink v. Branch*, 16 Conn. 261. "The authority to do an act or series of acts upon the land of another, such as to hunt, remove stone, or cut down trees, is a mere license, and conveys no interest in the land." Browne, Stat. of Frauds, § 26, and cases cited in note. "A parol license to dig minerals on the land of the licensor is valid." 3 Pars. Cont. 39. A third person built a house on the mortgaged premises for the mortgagor on the parol agreement of the mortgagee that he should be paid for it, or have a lien upon it in preference to the mortgage. The agreement was held valid. *Godeffroy v. Caldwell*, 2 Cal. 489. The sale of a mining claim does not affect the title of the land. *Hitchens v. Nougues*, 11 Cal. 29. The owner of the land verbally contracted with two others that they should dig and prospect for coal, and do all the other work to open the mine, and then that they would raise and sell the coal jointly, the profits to be divided equally. It was held a partnership in mining like any other partnerships, only it was not founded on the *delectus personæ*, and

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that it carried no interest in the land. *Ibid.; Duryea v. Burt*, 28 Cal. 569.

A verbal agreement between two or more to explore and locate and work lodes on government land is not within the statute. *Murley v. Ennis*, 2 Colo. 300. A verbal agreement that plaster lands and a plaster-mill should be bought and owned by A. and B., and worked by them as partners, is within the statute; but not so if the land was to be owned by one of them only. *Brosnan v. McKee*, 59 Mich. 107. To this case there is a note of cases of *Snyder v. Wolford*, 33 Minn. 175; *Carr v. Leavitt*, 54 Mich. 540; *Miller v. Kendig*, 55 Iowa, 174. These cases hold that when one person selects lands and contracts with another to purchase and hold them in his own name, and when they are sold the net profits to be divided between them in consideration of his services, the contract is not within the statute. The plaintiff was the owner of a limekiln, and it was verbally agreed that the defendant should fill it with limestone and furnish the wood to burn it, and the lime to be equally divided between them. It was held to be a partnership, and the defendant was liable for taking more than his share. *Musier v. Trumpbour*, 5 Wend. 274. A verbal agreement of copartnership was entered into by several persons for the purposes of developing plaster-beds on certain lands, and for getting out and selling plaster, and for procuring the title to the lands. The business went on until the lands were finally bought and paid for by the profits of the concern. It was held not to be within the statute. *Godfrey v. White*, 43 Mich. 171. A sale of shares of a mining company working a mine does not convey any interest in the land, but only in the severed mineral ores, machinery, and personal effects. Rog. Mines, 428. A partnership for the purpose of mining for lead ore, irrespective of title to the lands, may be formed by parol agreement, and will be treated, in respect to the ore raised, like any other partnership. *Sauntry v. Dunlap*, 12 Wis. 404.

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These cases clearly illustrate the principles underlying this contract or partnership in this case. There can no case be found, in my opinion, of similar facts, where it has ever been held that such a contract was within the statute. But there are many respectable authorities which hold that such a contract, even if it went further and provided that the lands themselves should belong to the partnership or be held in trust for the partnership for the purpose of mining or quarrying or milling, etc., was not within the statute. But such is clearly not this case; for there is no provision made for the purchase of the land or any interest in it from the defendant, although there is an averment in the complaint that the defendant held it in trust for the purpose of such quarrying business. This can only mean that the land was to be used by the partnership only for such purpose. It appears very clear, both from reason and authority, that this contract is not within the statute above referred to, and is therefore valid if it could be performed within one year, and not within the other section of the statute.

Was this a contract which by its terms was not to be performed within one year? If it was a contract to form a partnership for the above purposes merely, then it is very clear that it was to be performed at once and without any delay. *Hill v. Palmer*, 56 Wis. 123. An agreement to form a partnership to get out stone and construct certain public works was so far performed that the firm entered upon the business. The contract was held not to be within the one-year statute. *M'Kay v. Rutherford*, 13 Jur. 21; *Hoare v. Hindley*, 49 Cal. 274. But, in any view of the case that can be taken on the facts, a contract to form a partnership, or a contract of partnership entered upon nominally and then violated before anything has been done under it, is not within this statute. The identical point would seem to have been decided by this court in *Ganter v. Atkinson*, 35 Wis. 48. That was a verbal partnership agreement to work

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a certain mine. They were to begin at a certain point on the land described, and "to have the *exclusive* right to work and take out *all* ore found in the drift or in the crevices or openings between the line of the drift and the east boundary line of the land." It was not known, and could not be known, how long it would take "to take out all of the ore" in that district, but it might have been supposed that it would take a very long time and the ore to be nearly exhaustless, and was evidently supposed to be a very large and valuable enterprise. But it was sufficient that it was not known, and that the contract might be fully performed within the year. The question in that case was not under this statute, but under the exception to the first above section as of a lease "*for* a term not exceeding one year," and this court held that the contract was such a lease, and that it did not appear that the term would exceed one year. The question in this case of very similar facts, is the same in principle. That contract was held to be a *lease* rather than a *license*, because it was *exclusive* of the owner of the land, and valid because the term might end within one year.

A sale of property, with an agreement that the title should remain in the vendor *until it was paid for*, was held not to be within the statute, in *Esty v. Aldrich*, 46 N. H. 127. Although the money was payable at once, yet the time within which it might be paid was indefinite. A. gave B. an equitable interest in a patent-right, and B. was to make the machine practicable, and introduce it into the markets, and then they were to be tenants in common of the right. This contract was verbal, and held not to be within the statute. *Blakeney v. Goode*, 30 Ohio St. 350. "It did not appear that the contract could not be performed within one year." *Greene v. Harris*, 9 R. I. 401. A contract was to take effect at a certain date and continue as long as both parties were satisfied. Held not to be within the one-year statute. *Sherman v. Champlain*

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Transp. Co. 31 Vt. 162. This is precisely the case with all partnerships of unlimited time. If the time of performance depends upon a contingency which might happen within the year, the contract is not within the statute, such as a promise to forbear suit as long as a certain person should live. *Wells v. Horton*, 4 Bing. 40. The cases in this court hold that the contract must be such that *it cannot* be performed within one year, to be void under this statute. *Rogers v. Brightman*, 10 Wis. 65; *Heath v. Heath*, 31 Wis. 223; *Murray v. Abbot*, 61 Wis. 198. Besides this, many of the cases in this court hold that if the contract has been performed within the year by one of the parties, it is taken out of the statute. *McClellan v. Sanford*, 26 Wis. 595; *Coyle v. Davis*, 20 Wis. 564; *Jilson v. Gilbert*, 26 Wis. 637.

It is true that the complaint probably exaggerates the vastness and unlimited extent of this quarry, and on information and belief it is stated that it is *exhaustless*. But this was a mere strong expression of an expectation of great and lasting profits, to swell the damages in the case. But, in the nature of things, the parties could *not* have known, when the contract was made, that this quarry, so far as any valuable stone in it was concerned, would not be exhausted within one year. It had not been opened yet to ascertain to what extent and for how long a time it might be profitable to work this quarry. It was a partnership that might be dissolved by many contingencies, and the time of its continuance was unlimited.

But I have pursued this subject far enough and much further than necessary, and have made this opinion probably quite too long already. But the questions are very important, and there ought not to be any mistake made about the law in such a case. I have given these questions more attention, and examined the authorities more fully, than might appear to have been necessary, because the learned and distinguished counsel for the respondent, with his usual

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candor, expressed the utmost confidence in his positions on the argument. It would not be safe or seemly to differ with some lawyers who have examined a question in their own cases, and express positive confidence in their own opinions upon it, too hastily, or without much thought and research. But we are clearly satisfied that the contract set out in the complaint is in all respects a valid one and not within any of the provisions of the statute of frauds, and that the complaint states a good cause of action against the defendant.

The circuit court erred in sustaining the demurrer.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

See notes to this case in 32 N. W. Rep. 517, 523.—REP.

SMITH, Appellant, vs. MORGAN and others, Respondents.

February 5 — March 1, 1887.

Logs and timber: Public lands: Wrongful cutting: Measure of damages: Joinder of parties.

The holder of school-land certificates sold the timber on the lands to M. Bros., and they contracted with S. for cutting the timber on shares. After the timber had been cut the lands became forfeited to the state for nonpayment of taxes and interest, and were resold to the plaintiff, who, after obtaining a patent, brought an action against M. Bros. and S. for the value of the timber cut. The defendants answered that they had purchased the timber in good faith from the holder of the school-land certificate, and had cut and removed the same in good faith, believing that they had the right to do so. *Held:*

(1) There being no affidavit that the cutting was done by mistake (sec. 4269, R. S.), and the defendants not having "in good faith acquired a title to and entered upon the land under the same.

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believing such title to be valid" (ch. 239, Laws of 1882), the plaintiff was entitled to recover the highest market value of the logs or the lumber made from them, under sec. 4269, R. S.

(2) The action was maintainable against all the defendants jointly.

APPEAL from the Circuit Court for *Washington* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

August 28, 1874, one Joseph H. Porter, at a sale of school and university lands, bid in the several pieces of land in question situated in section 16, township 36 N., of range 12 E., and obtained from the state the usual commissioners' certificates thereof. For several years the interest and taxes were paid as they became due, until April 28, 1880, when the last payment was made. Prior to the winter of 1880-81, the defendants, the *Morgan Bros.*, of Oshkosh, purchased about 1,500,000 feet of timber from said Porter, a portion of which was on the land in question, and the rest on other lands in the same vicinity, and all near Rice lake, and paid Porter therefor. During that winter the *Morgan Bros.* agreed with the defendant *Streeter* to cut and put in on the bank of said lake all of said timber, he to have therefor two thirds of the logs therefrom, and they to retain the other one third. The taxes and interest not having been paid as required in said certificates, the lands in question became forfeited to the state; and December 15, 1881, they were resold to the plaintiff, who thereupon took school-land certificates therefor; and December 22, 1883, the plaintiff, having fully paid the amount required by such certificates, obtained a patent from the state for the lands in question.

February 15, 1884, the plaintiff commenced this action for the value of the timber so taken from said land, claiming that 650,000 feet had been so wrongfully taken therefrom without authority by the defendants and converted to their own use, and that the highest market value of the same was $15 for each 1,000 feet, and claimed as damages therefor

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$9,750. The answer admitted that the plaintiff had received a patent from the state, as claimed, and alleged that the defendants had taken from said lands only 65,000 feet, of the value of $130, and that the same was so taken in good faith and under the belief that they had the just and legal right so to do. On the trial the defendants amended the answer by stating therein, in effect, that the defendants so purchased the timber in good faith of Porter, who at the time of purchase and cutting held such school-land certificates, upon which there had been no forfeiture of interest at the time of such purchase.

On the trial the jury returned a verdict in favor of the plaintiff for $442.10, and from the judgment entered thereon the plaintiff appeals.

For the appellant there was a brief by *Cate, Jones & Sanborn*, and oral argument by *Mr. Jones.*

For the respondents there was a brief by *Jackson & Thompson*, and oral argument by *Mr. Thompson.*

CASSODAY, J. The amount of timber taken from the lands in question by the defendants in the winter of 1880–81 was in dispute. The *Morgans* claimed the right to the timber by an agreement with Porter, whom they paid for the privilege of cutting and taking off the same. Porter merely held school-land certificates for the lands, but had no title. The *Morgans* were to let *Streeter* have two thirds of the logs taken from the land, in payment for cutting and putting them in. Before the cutting, the *Morgans* gave to *Streeter* descriptions of the lands in question, among others, from which he was by them directed to cut. The *Morgans* bought of *Streeter* his portion of the logs, and manufactured them all into lumber at Oshkosh. They claim they are only liable for the stumpage value of the logs.

The only questions necessary to consider here are the plaintiff's right to recover, and the rule of damages appli-

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cable. There is no pretense that the school-land commissioners gave to Porter or the defendants, or any of them, any "written consent," or any consent, to cut or remove from said lands the timber in question, or any of it. This being so, such certificate so held by Porter conferred no right to cut down or carry off any standing wood or timber, except to be exclusively used in the erection of fences or buildings on such land, or for necessary fire-wood thereon, or for improving the same in good faith for cultivation. Sec. 220, R. S. There is no claim that any of the timber so cut came within any of such exceptions. After the forfeiture of the lands under the certificates so held by Porter, such certificates became utterly void and of no effect. Sec. 224, R. S.; *Conklin v. Hawthorn*, 29 Wis. 476. By reason of such forfeiture, Porter, and the defendants acting under him, were liable to be sued for any waste or any unnecessary injury which he or they had done to the same or to the timber thereon, and the commissioners were expressly authorized to prosecute any action therefor in the name of the state. Sec. 226, R. S. Had Porter, after such removal of timber and forfeiture, sought to obtain a patent, he would only have had a right thereto "by paying the amount then due the state on such certificates, with all legal charges, and in addition thereto one hundred per centum thereon penalty, and all the expenses of seizure and care." Sec. 241, R. S. The plaintiff, having received the patent for the lands in question pursuant to law, thereby acquired the right to all timber, lumber, trees, wood, etc., cut, taken, or removed therefrom before the issuance of such patent, and was thereby authorized to maintain any proper action for the recovery thereof, or for any injury done to, or trespass committed upon, said lands before such patent issued, in the same manner and with the like effect as if such injury or trespass had been committed after the patent had issued. Sec. 222, R. S.; *Conklin v. Hawthorn*,

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supra. Under the statutes cited there would seem to be no doubt as to the right of the plaintiff to maintain the action for the value of the timber so actually cut and removed from the land in question.

The question remains as to the proper measure of damages. The section of the statutes last cited provides that the person receiving such patent "shall be entitled to *like damages* as if such injury or trespass had been committed after the patent had issued." Sec. 222. In such case, "the highest market value of such logs, timber, or lumber, in whatsoever place, shape, or condition, manufactured or unmanufactured, the same shall have been at any time before the trial while in the possession of the trespasser or any purchaser from him with notice, shall be found or awarded to the plaintiff if he succeed, except as in this section provided." Sec. 4269. The only provision therein for enabling such trespasser or purchaser with notice to escape the payment of such highest market value, is to make and serve on the plaintiff the affidavit that such cutting was done by mistake, and therewith an offer in writing to allow judgment, etc. No such affidavit or offer was made in the case at bar. Another provision for enabling such trespasser, or purchaser with notice, to escape the payment of such highest market value, was enacted by ch. 239, Laws of 1882. That provides, in effect, that when the defendant in such action shall have in good faith acquired a title to and entered upon the land under the same, believing such title valid, and shall have cut the timber therefrom under such circumstances, then the plaintiff's recovery shall be limited to actual damages sustained by reason of such cutting; in which case the defendant in his answer shall state the facts upon which he relies to establish such claim of title, etc. The defendants apparently sought to bring themselves within that provision, but the facts clearly do not. The title to the lands was in the state. Porter had no title au-

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thorizing him to cut and remove timber from the land for the purpose of manufacture and sale, and could confer none upon the defendants or any of them. Neither he nor they could, as against the state or its grantee, in good faith acquire title to or enter upon the land under the same, believing such title valid. They were each and all chargeable with knowledge of the provisions of the statute. Those who trespass upon the public lands or purchase with notice from such trespassers do so at their peril. As a general rule the state is not to be bound by general words in a statute, restrictive of prerogative right, title, or interest, unless expressly named. *U. S. v. Herron*, 20 Wall. 251; *Palmer v. Hutchinson*, 6 App. Cas. 619, 34 Eng. (Moak), 666; *People v. Herkimer*, 4 Cow. 345, 15 Am. Dec. 379, and cases cited in the notes. *Streeter* cut the timber from these particular lands in pursuance of previous directions given therefor by the *Morgans*. There being no affidavit of mistake, and the facts not being such as to bring the case within the provision of ch. 239, Laws of 1882, it is conclusively presumed that the defendants knew the title was in the state at the time of such entry. It follows that, under the statute, the plaintiff was entitled to such highest market value.

The charge contains this instruction: "If the jury find from the evidence that the defendants purchased the timber in good faith, and entered upon the land and cut and took the logs believing in good faith that they had acquired title to such timber, then the plaintiff is only entitled to recover actual damages sustained by him by reason of such cutting, and is not entitled to recover the market value of the logs or lumber so made out of such logs." This was error under the rule stated. The instructions requested to the contrary should have been given.

The action is maintainable against all the defendants jointly. *Smith v. Briggs*, 64 Wis. 497.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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POPP, Respondent, vs. SWANKE and others, Appellants.

February 7 — March 1, 1887.

Statute of frauds: Oral contract for the sale of lands: Specific performance.

1. Under sec. 2304, R. S., an oral agreement for the sale of lands is *void*, not voidable merely, and specific performance will not be enforced on the ground of a part performance unless otherwise the defendant would be enabled to practice a fraud upon the plaintiff.
2. Parol evidence of an agreement for the sale of land was admitted upon the trial without objection, but the court was requested to find as a fact that the contract was oral, and as a conclusion of law that it was void. *Held*, that this was sufficient to raise the question of the validity of the contract.
3. S., having agreed orally to convey certain land and certain personal property to P. in payment for certain lumber to be delivered to him by P., executed a deed of the land to P. and delivered it to a third person in escrow, and also executed a written instrument by which he transferred "all the farming utensils belonging to me on the farm described as follows [describing the land]; the said farm being this day conveyed by me to said P.; also one hundred bushels of oats, fifty bushels of wheat, and six tons of hay out of the crops now growing and being on said premises." *Held*, that the contract was within the statute (sec. 2304, R. S.) and void.

APPEAL from the Circuit Court for *Green Lake* County.

Action to enforce the specific performance of a contract for the sale of land. The complaint alleges that the plaintiff and the defendant *August Swanke* entered into an agreement by which the plaintiff sold to said defendant a lot of lumber which the plaintiff owned and had at Saxeville, Waushara county, and Fremont, Waupaca county, the lumber at Saxeville to be transported by the plaintiff to Tustin, Waushara county, and the lumber at Fremont to be taken by said defendant at that place; that the said defendant was to pay therefor the S. ½ of the S. E. ¼ of section 14, town 25, range 8, west, in Eau Claire county, and all the farming utensils belonging to said defendant thereon; also

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one hundred bushels of oats, fifty bushels of wheat and six tons of hay out of the crops then growing on said premises; also one buggy and $20 in money; that thereupon the said defendant gave the plaintiff an instrument in writing in the words and figures following:

"PRINCETON, WIS., May 20th, 1884.

"For a valuable consideration I hereby sell and set over unto *Ferdinand Popp* all the farming utensils belonging to me on the farm described as follows, to wit: 'South half of the south-east quarter of section fourteen (14), town twenty-five (25), range eight (8), west, in Eau Claire county.' The said farm being this day conveyed by me to the said *Ferdinand Popp;* also one hundred bushels of oats, fifty bushels of wheat, and six tons of hay out of the crops now growing and being on said premises as aforesaid mentioned and described. AUGUST SWANKE."

The complaint further alleges that at the same time the said defendant *August Swanke* and his wife executed a warranty deed to the plaintiff of said land, and the same was to be delivered to the plaintiff when he had the lumber at Tustin.

The complaint further alleges that the plaintiff has performed all the conditions of said contract on his part; that he duly transported to Tustin all of said lumber which was at Saxeville, and that the said defendant has taken all of said lumber which was at Fremont and three fourths of the lumber which was at Saxeville; that the said defendant has delivered to the plaintiff said buggy, but in all other things refuses to fulfil and perform the conditions of said agreement on his part; that he refuses to permit the defendant *Harroun* to deliver said deed to the plaintiff, and refuses to deliver possession of said land or of said farming utensils, grain, and hay, and refuses to pay the plaintiff said twenty dollars.

The answer states the contract substantially as it is alleged

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in the complaint except that it denies that the defendant agreed to pay $20 in money, and alleges that the lumber was to be delivered at Tustin and Fremont free and clear of all charges whatsoever, and that the plaintiff then represented and it was understood that the lumber was unmeasured but contained about 140,000 feet. It admits the making of the instrument set out in the complaint, and also the execution of the warranty deed, as a part of the agreement, and alleges that said deed was delivered in escrow to the defendant *Harroun*, to be delivered to the plaintiff when he had delivered the lumber free of all charges as above stated.

The answer further alleges that the plaintiff has not performed all the conditions of the contract on his part, and that he has neglected and refused to deliver from 30,000 to 40,000 feet. It admits that the defendant *August Swanke* has taken all of the lumber which was at Fremont and a portion thereof which was at Saxeville, and admits that the plaintiff demanded the deed of the defendant *Harroun*, and that the latter refused to deliver the same to the plaintiff. It alleges that when the plaintiff demanded said deed it was not due to him, and he was not entitled to have and receive the same because he had not delivered said lumber or otherwise performed the conditions of said contract on his part; and further alleges that the defendant *August Swanke* "has always been ready and still is ready whenever the plaintiff shall deliver as by him agreed said lumber, to have the deed so placed in escrow delivered to the plaintiff."

The court found as facts that an agreement was entered into as alleged in the complaint, except that the plaintiff was not to be paid $20 in money; that the plaintiff has substantially complied with said agreement, but has failed to deliver 10,000 feet of lumber of the value of $110; that the value of said farm was $1,400, and the yearly value of the

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use thereof was $300; that the amount of lumber delivered was 84,000 feet of the value of $11 per M.; that the value of the grain and hay to be delivered by the defendant *Swanke* was $110, and the value of the farming utensils was $100; that there was no fraud in the said agreement or in the procurement thereof, and no claim of such was made until the trial of this cause, and such issue is not raised by the pleadings; that the defendant *Swanke* has had the use of said lumber for about two years, and has never offered to return or pay for the same, and has also had the use of said farm.

As conclusions of law, the court held that the plaintiff is entitled to the immediate delivery and possession of said deed from the defendant *Harroun;* that the plaintiff is entitled to the immediate delivery and possession of said land and farm, and the said farming utensils, from the defendant *Swanke;* that the plaintiff is not entitled to the delivery of said grain from *Swanke*, and that said grain be offset against said lumber not delivered; and that neither party recover costs.

From the judgment entered accordingly the defendants appealed.

For the appellants there was a brief by *Jackson & Thompson*, and oral argument by *Mr. Thompson.*

For the respondent the cause was submitted on the brief of *Gabe Bouck.* He contended, *inter alia*, that the question of the validity of the contract was not raised by the pleadings or evidence, and it is too late to raise it in this court. That it was oral is only a matter of inference. Wood on Frauds, sec. 537; Browne on Stat. Frauds, secs. 505, 555; Reed on Stat. Frauds, secs. 529–541, and cases cited in notes; *Duffy v. O'Donovan*, 46 N. Y. 226; *Marston v. Swett*, 66 id. 206; *Bommer v. Am. Spiral S. Co.* 81 id. 468; *Alger v. Johnson*, 4 Hun, 412; *Thurman v. Stevens*, 2 Duer, 609; *Lewin v. Stewart*, 10 How. Pr. 513; *Gardner v. Armstrong*, 31 Mo. 535; *Dinkel v. Gundelfinger*, 35 id. 172, 553;

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Sherwood v. Saxton, 63 id. 78; *Allison v. C. & N. W. R. Co.* 42 Iowa, 274; *League v. Davis*, 53 Tex. 14; *Sinclair v. Armitage*, 12 N. J. Eq. 177. Where the defendant admits a verbal contract by his answer the case will be taken out of the statute, even if there has been no part performance. Wood on Frauds, secs. 514, 517 and cases cited.

COLE, C. J. There is an insuperable difficulty in the way of affirming this judgment. The action is to enforce the specific performance of a parol contract for the sale of land. There has been no such part performance of the contract as will, under the decisions of this court, take the case out of the statute. *Blanchard v. McDougal*, 6 Wis. 167; *Smith v. Finch*, 8 Wis. 245. In *Smith v. Finch*, WHITON, C. J., says: "It is only in cases where the defendant would be enabled to practice a fraud upon the complainant unless the contract is specifically executed that a court of equity will interfere. If the purchaser has gone into possession of the land so as to render him liable as a trespasser if the agreement is held void, the court will enforce performance." Our statute expressly declares that every contract for the sale of lands shall be void unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the sale is made, or by his lawfully authorized agent. Sec. 2304, R. S. The difference between the phraseology of our statute and that of the English statute of 29 Car. II., and of the statutes of most of our sister states, is pointed out by DIXON, C. J., in *Brandeis v. Neustadtl*, 13 Wis. 142. Our statute says the contract *shall be void* if not in writing. It is not merely voidable, as the learned counsel for the plaintiff contends. The distinction between a void and a voidable contract is important, and cannot be disregarded. The contract in question is of the former character.

But the same counsel suggests that it is too late to raise

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the objection that the contract is invalid, because the objection was not taken by the pleadings or evidence. But the objection, we think, is available as the record stands. The answer states, in substance, that the plaintiff and defendant entered into a parol agreement, whereby the plaintiff sold to the defendant a lot of lumber which the plaintiff owned and had at Saxeville in the county of Waushara, and at Fremont in the county of Waupaca; that by the terms of this agreement it was provided that the plaintiff should transport and deliver the Saxeville lumber at Tustin free from charges, etc.; that in consideration thereof the defendant was to convey to him the land referred to in the complaint, and, in addition, transfer certain personal property named; that at the time, as a part of the arrangement or agreement, the defendant and wife executed a deed of the land to the plaintiff, and delivered it in escrow to the defendant *Harroun*. The answer further alleges that the plaintiff failed to perform the conditions of the contract on his part to be performed. All of the evidence in regard to the parol contract seems to have been admitted without objection — the parties differing materially as to its terms. At the close of the trial the defendant's counsel requested the court to find as a fact that the contract was by parol, and as a conclusion of law that it was void under the statute. This was sufficient to raise the question as to the invalidity of the contract in the court below.

From this statement of the case it is very plain that it comes fully and precisely within the decision in *Campbell v. Thomas*, 42 Wis. 439; for it is impossible to distinguish the cases upon any material point. There, in pursuance of an oral agreement for the sale of land by the defendant to the plaintiff, the latter paid a small part of the purchase money, and the defendant executed a deed of the land running to the plaintiff (in which the consideration was simply stated to be $3,100), and delivered the conveyance to H., with di-

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rections to deliver it to the plaintiff if the latter should on the second day thereafter deposit with H. his two notes for a certain sum secured by a mortgage, and also pay to H. for the defendant the balance of the consideration. Within the time, the plaintiff offered to H. the notes, mortgage, and money; but H., by the defendant's direction, refused to deliver to him the deed, and at the same time tendered back to the plaintiff the money already paid. In an action against the vendor and depositary to compel a delivery of the deed to the plaintiff, the court held that the contract of sale, resting as it did in parol, could not be enforced. The case was very fully and ably argued on the first hearing and on the rehearing which was granted, and it was most carefully and thoroughly examined by the court. The instructive opinions filed by Mr. Justice LYON and the chief justice contain all the law and reasons which need be presented to vindicate the soundness of the decision made. It would be idle to enter upon a further discussion of the question here.

In this case all the terms for the contract of sale rest in parol, the consideration for the conveyance, and the stipulations as to the sale and delivery of the lumber. True, the defendant *Swanke* gave a written bill of sale of the personal property which the evidence shows he sold with the land, in which he transfers "all the farming utensils belonging to me on the farm described as follows, to wit: S. ½ S. E. ¼ sec. 14, town 25, range 8 west, in Eau Claire county,— the said farm being this day conveyed by me to said *Ferdinand Popp;* also one hundred bushels of oats, and fifty bushels of wheat, and six tons of hay out of the crops now growing and being on said premises as aforesaid mentioned and described." But this bill of sale does not state that the personal property sold and farm conveyed was in consideration of the lumber purchased. So, when we inquire what the contract for the sale of the land was, we

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find it was not in writing. Therefore it is obvious that there was no valid contract to sell and convey the land, because all rested in parol. Perhaps no case could be presented which would more forcibly illustrate the wisdom of the statute than the one at bar. The contract of sale, as stated in the complaint, differs from the contract set forth in the answer. The parties differ materially as to the terms of the contract in their testimony. The defendant says that the plaintiff represented that the saw-bill called for from 140,000 to 145,000 feet, and that he relied upon this statement as to the quantity of lumber purchased. The court found that the quantity of lumber delivered was 84,000 feet, which the plaintiff says was all he undertook to deliver. And there were other differences in the versions which the parties give of the transaction. The parties contradict each other; one or the other perhaps "committing just such perjury as the statute was passed to prevent." RYAN, C. J., in *Campbell v. Thomas.*

But it is said the bill of sale to which we have referred, and the conveyance of the land made at the time and deposited with *Harroun* in escrow, satisfy all the requirements of the statute. But the bill of sale states no contract for the sale of land. It describes the farming utensils and crops sold as being and growing upon a tract of land which "is this day conveyed by me to *Ferdinand Popp.*" But this shows no valid contract for the sale of the land. We must still resort to parol evidence to ascertain what that contract was. But this we are not permitted to do, because the statute requires such a contract, or some note or memorandum thereof expressing the consideration, to be in writing.

The court found that the plaintiff delivered on the contract 84,000 feet of lumber, of the value of $11 per thousand. No exception is taken to this finding upon either side. The plaintiff admits that he received a buggy on the contract, the value of which is not determined. The counsel for the

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defendant states that he concedes the right of the circuit court, under the circumstances, to retain jurisdiction of the action for the purpose of awarding compensation to the plaintiff for the value of the lumber delivered, after deducting the price of the buggy. Certainly, such a judgment would work no injustice to any one, and the rights of the parties can be fully protected by the court so adjusting the matter, and save them the expense of bringing a suit at law to recover the value of the lumber. Of course, the question of costs can be settled by the court below as justice may require.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

WILL OF SILVERTHORN.

February 7 — March 1, 1887.

WILLS: EVIDENCE. *(1, 3) Testamentary capacity: Burden of proof. (2) Transactions with deceased: Competency of devisee to testify.*

1. The evidence in this case — showing, among other things, that the testator had for several years been suffering from softening of the brain, which finally culminated in his death at the age of seventy-five shortly after the execution of the will; that at times he had suffered from severe nervous prostration, and that during such times his intellect was very feeble and his power of memory largely gone, but that in the intervals between such attacks his mind was reasonably clear; that in one of such intervals he gave directions for drawing the will and executed the same; and that the elements entering into the will were few and simple, and the will itself a reasonable one — is *held* to sustain the finding of the county and circuit courts that the testator had sufficient testamentary capacity to execute the will.
2. Whether a devisee or legatee named in a will is competent to testify in support of the will to conversations and transactions with the testator in his life time, not determined.

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3. LYON, J., is of the opinion that the statute (sec. 3788, R. S.) requires affirmative proof of the testator's sanity before a will can be admitted to probate; but that when a *prima facie* case has been made, the presumption *of sanity* arises, and the burden of proof is thereafter upon the contestant.

APPEAL from the Circuit Court for *Winnebago* County.

An instrument purporting to be the last will and testament of Levi Silverthorn was presented to the county court for probate by *Levi J. Silverthorn*, one of the executors named therein. The probate thereof was opposed by *Rebecca Silverthorn*, the widow of the alleged testator. After a hearing, the county court admitted the instrument to probate. *Mrs. Silverthorn* thereupon appealed to the circuit court, and the matter was tried in that court. After the trial the court made and filed the following findings of fact:

"(1) That Levi Silverthorn died in the county of Winnebago, where he had been for many years a resident, on the 23d day of December, 1884. (2) That the disease of which he died was softening of the brain, and that such disease had been steadily progressing for several years, until it culminated in his death at the age of seventy-five or thereabouts. (3) That on the 16th day of July, 1884, he duly made, executed, published, and declared as his last will and testament the instrument in controversy. (4) That at the time of making said will, and for a long time prior thereto, his intellect was very feeble; that his power of memory was largely gone, and that his power of continuity of thought was largely destroyed, and he was capable of transacting only the simplest kind of business, such as the purchase of small quantities of groceries and supplies for his family, and then, in many cases, he was not capable of making the proper change therefor, but was obliged to ask others to do it for him; that at the time and times last aforesaid he was frequently unable to remember the names of some of his

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nearest neighbors and friends, and would be obliged to inquire who they were; that in the little village of Omro where he resided he was frequently unable to tell where he was, and required the assistance of friends to show him the way home. (5) That in common conversation he would frequently lose the train of his idea, and would have to be prompted to enable him to regain it; that sometimes he would then go on with the subject, and at others would again seem to lose the idea. (6) That all the intelligent conversations shown at or about the time of the making of this will (in controversy) were of the simplest kind, and pertained to farming or the handling of farm products, which had been his life-work. (7) That he had a severe illness some five or six years prior to his death, which seriously impaired his health both physically and mentally, and from that time until his death his intellect was constantly growing more and more feeble. (8) That no undue influence was exercised in the making or procurement of said instrument proposed as a will. (9) That on the 27th day of December, 1880, he executed in due form a previous will, which has been offered in evidence in this cause, and propounded. (10) That said instrument, made July 16, 1884, was the last will and testament of said Levi Silverthorn. (11) That he had sufficient testamentary capacity to execute said will."

The court also made and filed the following conclusions of law from the facts so found: "(1) That said Levi Silverthorn had, at the time (July 16, 1884) of making said will, sufficient testamentary capacity to make a will. (2) That the instrument last aforesaid was his last will and testament, duly executed, published, and declared as such. (3) That the judgment of the county court herein should be affirmed."

Judgment was thereupon entered affirming the judgment of the county court admitting such instrument to probate.

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The contestant, *Mrs. Silverthorn*, appeals to this court from the judgment of affirmance.

For the appellant there was a brief by *Gary & Forward*, and oral argument by *Mr. Gary*. They contended, *inter alia*, that the mind of the testator was so impaired that a testamentary disposition of his property should not be sustained unless *affirmatively proved* to have been fairly made. *Mowry v. Silber*, 2 Brad. Sur. 147. Nothing but the most clear and satisfactory proof can establish this instrument as a will. *Delafield v. Parish*, 25 N. Y. 35, 36; *Mowry v. Silber*, 2 Brad. Sur. 133, 147; *Boyd v. Boyd*, 66 Pa. St. 283; *Cuthbertson's Appeal*, 97 id. 163; *In re Welsh*, 1 Redf. Sur. 238–9, 241–5; *In re Ames*, 51 Iowa, 596. It was error to allow *Levi J. Silverthorn* to testify to any transactions or communications of the deceased at the time of the making of this instrument, since he is a party to this suit, and derives his interest from the deceased. Sec. 4069, R. S.; *Daniels v. Foster*, 26 Wis. 686; *Belden v. Scott*, 65 id. 425; *Holcomb v. Holcomb*, 95 N. Y. 316, 326. In cases of wills the burden of proof is upon the proponent to establish the fact that the testator was of sound and disposing mind; and this burden *never* shifts during the trial, but remains with the party setting up the will. Sec. 3788, R. S.; *Delafield v. Parish*, 25 N. Y. 9, 29–35; *Williams v. Robinson*, 42 Vt. 658, 662–4; *Crowninshield v. Crowninshield*, 2 Gray, 526; *Gerrish v. Nason*, 22 Me. 338; *Cilley v. Cilley*, 34 id. 162; *Rees v. Stille*, 38 Pa. St. 138; *Riggs v. Wilton*, 13 Ill. 15; *Trish v. Newell*, 62 id. 196; *Comstock v. Hadlyme Ecc. Soc.* 8 Conn. 254; *Tingley v. Cowgill*, 48 Mo. 291; *Renn v. Samos*, 33 Tex. 760.

For the respondent there was a brief by *Hicks & Phillips*, and oral argument by *Mr. Hicks* and *A. H. Goss*. They argued, among other things, that when the disease is intermittent in its nature, it does not affect testamentary capacity, if the testator was free from it at the time of making his

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will. Gary's Prob. Law, sec. 125 and cases cited; 9 Oreg. 128; 94 Ill. 560; 21 Me. 461; 31 N. J. Eq. 633; 4 Bradf. Surr. 238; 49 Wis. 179, 183. The testimony of *Levi J. Silverthorn* was competent. 3 Redf. 78; *Will of Wilson*, 103 N. Y. 374; *Brown v. Bell*, 58 Mich. 58. The burden of proving testamentary capacity is in the first instance upon the proponent of the will. But after he has made his *prima facie* case, and formally complied with the statutory requirement, the burden shifts to the contestant and remains with him throughout the trial. *Sloan v. Maxwell*, 13 N. J. Eq. 563, 580; *Hawkins v. Grimes*, 13 B. Mon. 257, 270; *Clark v. Ellis*, 9 Oreg. 128; *Higgins v. Carlton*, 28 Md. 115, 132; *Tyson v. Tyson's Ex'rs*, 37 id, 567, 584; *Grabill v. Barr*, 5 Pa. St. 441, 443, 447; *Pettus v. Bingham*, 10 N. H. 514, 516; *Perkins v. Perkins*, 39 id. 163, 168-170; *Kempsey v. McGinniss*, 21 Mich. 124, 147-8; *Barnes v. Barnes*, 66 Me. 286, 300; *Webber v. Sullivan*, 58 Iowa, 260; *Potter v. McAlpine*, 3 Demarest, 108, 115; *Will of Cole*, 49 Wis. 179, 182; *Lewis' Will*, 51 id. 101, 112.

Lyon, J. 1. The main question presented by this appeal is, Was Levi Silverthorn, the alleged testator, of sound and disposing mind and memory when he executed the instrument propounded and probated as his last will and testament? As is usual in cases in which testators who, when they executed their respective wills, were on the border-line between mental competency and incompetency, the opinions of witnesses in this case as to the mental *status* of Levi Silverthorn are in conflict. This results from the different circumstances under which they saw him, and his various mental conditions at different times, which came under their respective observations. The causes for such conflict of opinion or, at least, for the opinion that the deceased was of unsound mind, are quite clearly reflected in the findings of the learned circuit judge. Those findings, from the sec-

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ond to the seventh inclusive, contain statements of many facts and circumstances which, taken together and assuming that the same conditions existed when the will was executed, probably make a case of want of testamentary capacity, and which, unexplained, would be in conflict with the eleventh finding that the deceased then "had sufficient testamentary capacity to execute said will." But after a careful examination of the testimony, we are satisfied that there is no real conflict in the findings of fact, but that any apparent conflict therein may be satisfactorily explained without disturbing any of them.

When the will in question was executed, Levi Silverthorn was physically quite infirm. The process of softening of his brain had been going on for several years, but had not brought him to the state of idiocy or even incipient idiocy. His disease, however, caused serious nervous disturbances. At intervals he suffered from severe nervous prostration, continuing two or three days at a time. Often at these times he was in the mental condition described in the fourth, fifth, and sixth findings of fact. Probably he could not at those times have made a valid will. But, in the intervals between such attacks, there is abundant evidence that his mind was reasonably clear, and that he had sufficient mental capacity to make a valid will, within the rules of testamentary capacity which have frequently been laid down by this court. The elements entering into his will were few and simple, and were all the subjects of daily conversation and thought. His property consisted of a farm of 140 acres and the usual outfit of such a farm; forty acres of land detached therefrom; a small homestead in Omro, a few miles from his farm, on which he resided; a life insurance of $1,000, taken for the benefit of his wife; his household goods; and perhaps a small amount of other personal property. He had a wife and an adopted son, who lived on his farm. He had also a nephew and grand-

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son, each of whom bore his name. They were evidently his favorites. No other persons seemed to stand so near to him as these persons above mentioned, and to them (and a favorite niece), in different proportions, he gave his property. To gather and hold these elements in his mind, to comprehend their relations to each other, and to form a rational judgment based upon them, would not seem to require any great mental power or effort. A man of very moderate intellectual ability would be equal to such a task.

We are satisfied from the evidence that during the intervals between the periods of sickness and prostration above mentioned the testator was usually competent to make a valid testamentary disposition of his property; that during one of these intervals he gave directions for drawing the will in question, and executed the same; and that he sufficiently understood the nature and effect of what he was doing. Such, we think, must have been the views of the circuit judge, although not as fully expressed in the findings as might be desirable. We understand the condition of the testator described in the fourth, fifth, and sixth findings of fact relates only to his periods of sickness and prostration, and that described in the eleventh finding to the lucid intervals between, including that during which the will was executed. This view makes the findings consistent with each other, and in accord with the fair preponderance of the evidence.

2. On the trial the proponent, *Levi J. Silverthorn*, who is one of the devisees named in the will, was permitted, against objection, to testify to conversations and transactions with the testator in his life-time. We are inclined to think the testimony was incompetent under sec. 4069, R. S., and have acted upon that impression by excluding from our consideration the testimony objected to. We do not, however, determine the question of the admissibility of such testimony in like cases.

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3. In the argument of the cause in this court there was some debate as to which party is charged with the burden of proof when probate of a will is contested because of the alleged mental unsoundness or insanity of the testator. It was said that a remark in the opinion prepared by the writer in the case of *Will of Cole*, 49 Wis. 179, has led some members of the bar to maintain that, when a will is presented for probate, no affirmative proof of the mental soundness or sanity of the testator is required, but that the presumption of sanity asserted in that case is sufficient. We were somewhat pressed by one of the learned counsel to make a further deliverance on that subject.

This question of the *onus probandi* in such cases does not necessarily arise on this appeal, for we think the findings of fact are sustained by a preponderance of proof. Hence the question will not be here determined. Under the circumstances, however, the writer will be pardoned for expressing the opinion, on his own responsibility and without consultation with his brethren, that the statute (sec. 3788, R. S.) requires affirmative proof to be made of the mental soundness of the testator before the will can be admitted to probate, and that until such affirmative proof is made there is no presumption of sanity; but that, when a *prima facie* case of sanity is made by the proofs, and some contestant makes an issue as to the sanity of the testator, the presumption of sanity arises, and the burden of proving the testator of unsound mind is upon him who asserts it. Nothing further or different was intended in the *Cole Will Case*, or fairly to be inferred from the language there used, which is as follows: "However, the legal presumption is in favor of sanity, and, on the issue of sanity or insanity, the burden is upon him who asserts insanity to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way."

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By the Court.—The judgment of the circuit court is affirmed. The taxable costs in this court will be paid out of the estate of the testator. The rule of costs in the circuit and county courts is stated in *Will of Smith*, 52 Wis. 543.

See note to this case in 32 N. W. Rep. 287.—REP.

DUFFY, Respondent, vs. HICKEY, Appellant.

February 8—March 1, 1887.

PRACTICE. *(1) Change of venue: Motion after reference. (2) Reference: Correcting minutes of evidence: New trial. (3) Order of proof: Discretion. (4) Trial by referee: Improper evidence: Reversal of judgment. (5, 6) Taxation of costs: Remission of excess: Costs on former trial.*

1. An application for a change of the place of trial on the ground of prejudice of the judge, made after the cause has been referred and the referee has made his report, is too late.
2. The fact that a referee's minutes of the evidence have been changed is not a ground for setting aside his report and directing a new trial. The remedy is by correction of the minutes.
3. The admission of evidence in reply, which should have been given in opening the case, is a matter in the discretion of the trial court, and if the opposite party has not been injured by its admission out of its proper order the judgment will not be reversed therefor.
4. The admission of improper evidence by a referee is not ground for a reversal if there was sufficient evidence properly admitted to sustain the findings.
5. An error in the taxation of costs, by the allowance of too large a sum, is cured by a remission of the excess before the appeal is taken.
6. Where costs have been taxed on a former trial the amount thereof may be allowed as a single item upon a final taxation in favor of the same party.

APPEAL from the County Court of *Fond du Lac* County.

The case is sufficiently stated in the opinion.

De W. C. Priest, for the appellant.

For the respondent there was a brief by *F. F. Duffy*,

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attorney, and *Duffy & McCrory*, of counsel, and oral argument by *Mr. F. F. Duffy*.

TAYLOR, J. This action was tried in the county court of Fond du Lac county. It was an action upon an account for work and labor and for goods sold and delivered. On the part of the defendant a counterclaim was set up. The case was referred to a referee to hear, try, and determine. No question is made upon the order of reference. The referee tried the case, and found in favor of the plaintiff, and directed judgment in his favor for the sum of $208.52, and costs of the action. Upon the filing of the report of the referee the appellant filed an affidavit of prejudice and asked that the cause be removed on account of the prejudice of the county judge. This motion was denied, and exception taken. Exceptions were taken to the report of the referee, and the county court was asked to modify the report in various respects, and also to set aside the report and re-refer the case. All exceptions and objections to the report were overruled by the county court, and the report of the referee was in all things affirmed and judgment entered as directed by the referee. Exceptions were also taken by the appellant to the bill of costs as taxed by the clerk and affirmed by the court on motion to set aside the taxation. After judgment was entered, the defendant appealed therefrom to this court.

It is alleged that the court erred in not granting the appellant's motion to change the place of trial on account of the prejudice of the judge. We think the motion came too late, after the cause had been referred and the referee had made his report. This court determined this question against the appellant in *Cairns v. O'Bleness*, 40 Wis. 469, 477; *Swineford v. Pomeroy*, 16 Wis. 553.

The learned counsel for the appellant claims that the court erred in refusing to set aside the report and re-refer

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the action, because he alleges the minutes of the referee in regard to certain evidence had been changed. Had it been satisfactorily shown that the minutes had been changed, it would have been no ground for setting aside the report and ordering a new trial. The remedy in such case would be to correct the minutes of the evidence in accordance with the facts. We think, however, that the appellant failed in showing that the evidence as reported by the referee was not a correct report. The preponderance of the evidence seems to us to be in favor of the minutes of the referee.

The learned counsel for the appellant claims that the court should have modified the report by finding that the defendant be allowed $202.35 as a counterclaim against the respondent, which was wholly disallowed by the referee. This was a claim for taking care of some sheep, a horse, and two heifers of the plaintiff while the plaintiff was away from his home and farm. On the part of the respondent it was claimed that the defendant agreed to take care of said stock for one half of the wool of the sheep, and one half of the lambs, and that he was to have the use of the cow for keeping her. Upon this question the evidence was somewhat in conflict; but it is sufficient upon this appeal that it does not appear that the clear preponderance of the evidence is in favor of the claim made by the appellant.

The appellant also claims that he ought to have been allowed $50 for the board of the plaintiff for five months, and instead thereof the referee allowed the plaintiff $50 and his board for working for the defendant during said five months. This question was purely a question of fact. The evidence on the part of the plaintiff showed that the plaintiff did work for the defendant five months, and that his work was reasonably worth $10 per month and board. On the part of the defense the evidence tended to show that his labor was worth nothing, that he did not in fact do any work for defendant, and that defendant boarded

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the plaintiff for said five months. This, also, is a simple question of fact. There is evidence sustaining the plaintiff's claim and the finding of the referee; and the decision of the referee and court on this question of fact must stand.

It is insisted that the referee found that the defendant had performed services for the plaintiff of the value of $202.35, and then disallowed the whole claim on the ground that the defendant had agreed to perform the services upon a special contract for a greatly less sum. We find nothing in the report of the referee which justifies the claim that he found the value of such services to be $202.35 or any other sum. All that can be justly said of the report in this respect is that it states that the defendant claimed $202.35 for said services, and that the referee allowed him for the same only the value of half the wool and half the lambs of some sheep belonging to the plaintiff, which he claimed was, by agreement, the compensation the defendant was to have for such services.

It is also urged as error that the plaintiff was allowed to give some evidence in reply, which it is claimed ought to have been given in opening his case. There may be some doubt whether the evidence given in reply was not strictly such; but, if it were otherwise, it is a matter in the discretion of the trial court to permit such evidence to be given out of the proper order, and, unless the opposite party can clearly show that he has been injuriously prejudiced by the admission of such evidence out of its proper order, it is not error for which the judgment should be reversed.

It is also said that evidence of statements made by the defendant at an attempted settlement were improperly admitted in evidence on the part of the plaintiff. We find nothing in the case upon which this objection can be fairly based. If improper evidence had been received by the referee, it would be no ground of reversal if there was suffi-

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cient evidence to sustain his findings which was properly admitted in the case. *Holendyke v. Newton*, 50 Wis. 635.

The objection to the taxation of costs was perhaps well taken. This was an action upon contract, and in such cases the prevailing party cannot recover to exceed $25 as attorney's fees in any case. See sec. 2921, R. S. 1878. The court taxed more than $25 as attorney's fees, but afterwards, and before the appeal was taken in this case, the plaintiff remitted, in writing filed with the clerk of the court, the excess over $25, and gave notice of such remittance to the defendant. The judgment ought not, therefore, to be reversed because the costs were originally taxed at too large a sum. The remission of the excess before the appeal was taken cured the error.

The objection that one of the items in the copy of the bill of costs served was a gross sum which had been taxed to the plaintiff on a former trial, was not such an error as prejudiced the defendant. It is to be presumed that he had notice of the items of that bill when it was originally taxed on the former trial, and it was unnecessary to serve the items again on the final taxation on the new trial.

On the whole, the case seems to have been very fully and fairly considered, both by the referee and the court.

By the Court.—The judgment of the county court is affirmed.

RING, Appellant, vs. DEVLIN and another, Respondents.

February 8 — March 1, 1887.

Officers: Superintendent of county asylum: Reward for return of escaped lunatic.

The overseer or superintendent of a poor-house and county asylum cannot recover the reward offered for the return of an insane person, who has escaped from another asylum and has been placed,

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by the authorities of a town into which he wandered, in the asylum of which such overseer has charge; and a promise to pay such reward to him, and a guaranty of such promise, are without consideration.

APPEAL from the Circuit Court for *Fond du Lac* County.

The facts are sufficiently stated in the opinion.

For the appellant the cause was submitted on the brief of *C. S. Matteson.*

Alex. Wilson, for the respondents.

ORTON, J. The complaint states substantially the following facts: In 1881 the respondent *Edward Devlin* was appointed by the county judge of Iowa county guardian of one Frank J. Rowe, an insane person, resident of said founty, and sometime thereafter, and previous to the 3d day of December, 1885, he placed said insane person in the Milwaukee county insane asylum at Wauwatosa, for treatment and safe-keeping, and at said last-mentioned date said insane person escaped therefrom and could not be found or his whereabouts ascertained. On the 17th day of December thereafter the said *Devlin* published in the *Milwaukee Sentinel* an offer of a reward of $300 to any person who would return said insane person to said insane asylum, and gave a description of his person. On the 12th day of December, 1885, an unknown demented person was sent to the Fond du Lac county poor-house by the authorities of the town of Metomen, of said county, and the appellant, the plaintiff in this suit, was at the time the overseer of said poor-house and county asylum of the county of Fond du Lac, and he wrote numerous letters to the authorities of insane institutions in different parts of the state, describing said insane person, with a view of locating his proper abode. On the 18th day of December, 1885, R. M. Wigginton, the superintendent of the Northern Hospital for the Insane, in Winnebago county, wrote to the plaintiff in

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response to a former communication from him, and enclosed a postal card, signed by the defendant *Edward Devlin*, containing the offer of said reward of $300 for the return of said insane person as aforesaid, and an accurate description of his person, and on the 21st day of said month the plaintiff returned said insane person to the said Wauwatosa asylum, and the said defendant *Devlin* on the same day promised to pay the plaintiff said reward, but on a subsequent demand he has refused to do so. On the 19th day of said month of December the defendant *Louis A. Lange* guarantied the payment of said reward to the plaintiff upon the delivery of said insane person to said Wauwatosa hospital. The plaintiff was put to great trouble and expense in locating and so delivering said insane person. Judgment for said $300 and costs is demanded. To this complaint the circuit court sustained a demurrer, presumably on the ground that it did not state facts sufficient to constitute a cause of action, and this appeal is taken from said order.

The complaint is very indefinite, vague, and uncertain as to the legal character of the institution, called in the first place a "poor-house," and in the second place a "poor-house and county asylum," and as to the name and duties of the officer in charge of it, who is called in the first place "*overseer* of the poor-house," and in the second place "overseer of the poor-house and county asylum," and, in the brief of plaintiff's counsel, "*superintendent* and *keeper* of the poor-house and asylum." It cannot be known by the complaint what particular official relations the plaintiff bore to this insane person, or what his special duties were as his keeper in the institution under his charge. In deciding, therefore, upon the question whether the complaint states a cause of action, we must do so upon probabilities and legal presumptions mainly, and in view of the statutes which govern a poor-house as such, and an insane asylum as such, of the county of Fond du Lac, and which prescribe the

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duties of the officer specially and personally in charge of either one or the other. We shall not cite the particular statutes upon the subjects, but assume what their effect must necessarily be in application to the facts stated in the complaint. We shall therefore assume (1) that the authorities of the town of Metomen, of Fond du Lac county, had lawful authority to transfer this insane person to the county poor-house or asylum; (2) that he was thereafter to be *safely kept* and properly cared for in said institution, until he was discharged therefrom or transferred to the Wauwatosa hospital by lawful authority and according to law; (3) that the plaintiff, as the officer in charge of said poor-house and said insane person therein, had lawful authority to hold, keep safely, and detain said insane person within said institution, and discharge such duties in relation to him therein as the law prescribes; (4) that this insane person could not be discharged, let out, or so transferred, except in some way and manner prescribed by law, of which a record is presumed to have been duly kept; (5) that the plaintiff, as such officer and keeper, must in all cases act not only officially but most strictly according to law in letting out, discharging, or transferring such insane person, and be able to justify the same by law and by his record; (6) that the plaintiff had no right as such keeper to allow any private person, without some legal authority or direction, to let out, release, discharge, or transfer such insane person from said institution, or aid, counsel, advise, or abet the same; (7) that said plaintiff, while so in charge of said institution and said insane person therein, as overseer or keeper thereof, had no right to enlarge, release, discharge, or transfer said person from the same as a mere *private* person, or unofficially; (8) that said plaintiff, either officially or unofficially, had no right to the custody of said insane person, or to take or carry him from place to place, or hold or take care of him outside and beyond the lawful limits of said institution, without

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special and lawful authority conferred by some statute or judicial order or direction.

The learned counsel of the appellant claims the right of the plaintiff to this reward only because he acted as a *private* person and not as an *officer*, and that as an officer he admits he had no right to perform these acts. He says in his brief that "neither is there any *common law* requiring superintendents of such institutions to arrest and return escaped lunatics and paupers to institutions over which they have no authority or control." We most fully agree with the learned counsel in this, and he might as well have added that he had no right to be absent from his proper place as such keeper, and spend time the law devotes to such public uses and services, and compensates him therefor, in carrying such demented persons about the state. The reasoning of the learned counsel would lead to this: that the plaintiff had no right as an officer to do these high-handed and unauthorized acts; but that he could lay aside and utterly neglect his official duties as keeper or overseer, leave the institution in his charge without a keeper, lay aside his robes and insignia of office, or vacate his office for a time and transform himself into a *private* person, let out or take out of the institution the lawful inmates thereof, and carry them about the state for rewards or for any other purpose. Let us see how this thing would work. Richard Ring, as *keeper*, *overseer*, and *superintendent* of the poor-house and asylum, delivers over to Richard Ring, a *private* person, one of the inmates of the institution, lawfully detained and kept therein, and allows *him* to take him away and carry him a long distance and place him in another institution for a $300 reward. Richard, the *officer*, is not influenced or corrupted by any sordid motive of reward, for he ought not to be; but Richard, the *private*, is so influenced and has the right to be. Richard, the officer, receives a postal card containing the offer of a reward of $300 if he will take out of his insti-

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tution one of the inmates and carry him away and deliver him to some one else or to some other institution. He reasons with his conscience and with the law thus: "As an *officer* I cannot, *dare* not, do this thing, but as a *private* person I can and dare; therefore I will do it as a *private* person." As a private person he has not the least right or authority to do any such thing. Would it not be *kidnaping*, within sec. 4387, R. S., for him to do so? It is very clear by the admission of the learned counsel himself, and by the authorities, that he had no such right in either capacity.

The learned counsel of the appellant further admits, and such is clearly the law, that "the Revised Statutes of Wisconsin do not require the superintendent of a county poor-house or asylum to arrest and return any person escaping from any poor-house or asylum in the state, other than the one over which he has supervision, and then *only when authorized by rules and regulations adopted by the board of supervisors of the county having jurisdiction of such superintendent.*" And he further admits "that an offer of reward to a public officer to do what it is his legal duty to do without such reward, is contrary to public policy, and cannot be enforced." *Hatch v. Mann*, 15 Wend. 44; *Pool v. Boston*, 5 Cush. 219; *Preston v. Bacon*, 4 Conn. 471. If, then, such officer has no right to receive such reward for doing what it is his duty to do, and it would be against public policy for him to do so, so much less has he the right to receive a reward, and so much more would it be against public policy for him to do what it was not only *not* his duty to do but in violation of his duty and the law for him to do either as an officer or as a private person; and this rule he also admits in the above quotation and makes it emphatic. It follows most conclusively that the plaintiff shows by his complaint that he has no right to recover. The promise of the defendant *Devlin* and the guaranty of

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the defendant *Lange* rest upon this void and illegal consideration, and are clearly void. If the plaintiff is not entitled to the reward, he, of course, is not entitled to recover it from *any one*. The demurrer was properly sustained.

By the Court.— The order of the circuit court is affirmed, and the cause is remanded for further proceedings according to law.

GERMAN AMERICAN SAVINGS BANK vs. FRITZ, Appellant, impleaded with BLANKENBURG, Respondent, and another.

February 8 — March 1, 1887.

Suretyship: Payment of judgment: Subrogation: Method of enforcing contribution.

1. One surety who has paid a judgment rendered against the principal debtor and all the sureties, may, for the purpose of enforcing repayment from the principal or contribution from his co-sureties, be subrogated to all the rights of the judgment creditor, especially if he has taken an assignment of the judgment.
2. To secure the benefit of the lien of such judgment as against a co-surety, the surety paying should ordinarily resort to an equitable proceeding; but when such co-surety has made a motion, based on such payment, that the judgment be canceled and declared satisfied as to all the defendants, the court may order the judgment to stand as against him to the extent of his liability to contribute, and may award execution thereon against him for that amount.

APPEAL from the Circuit Court for *Fond du Lac* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

It appears from the record that the defendant Servatius made his two promissory notes, each payable to the order of the defendants *Fritz* and *Blankenburg*, both of whom indorsed each of said notes for the accommodation of said Servatius, one bearing date January 19, 1877, for $1,000

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and interest, and the other bearing date April 25, 1877, for $1,025.83 and interest, and each of which was, at the time of the making thereof, discounted by Servatius for his own benefit at said bank, and each of which thereupon became the property of the bank. February 14, 1878, the plaintiff bank recovered and docketed a judgment against all three of said defendants upon said notes for $2,035.04, damages and costs. August 24, 1882, *Blankenburg* paid to the bank the whole amount of said judgment, and on the same day the judgment was satisfied of record as to him. August 28, 1882, the plaintiff assigned the judgment to *Blankenburg* by an assignment in writing which was thereupon filed with the clerk of the court and a minute thereof made in the docket of the judgment.

August 15, 1885, upon motion of *Fritz* for an order canceling the judgment against all said defendants on the ground that the same had been purchased by, and assigned to, said *Blankenburg* and thereby paid, based upon his affidavit and the affidavit of *Blankenburg* and the president of the bank and the record and judgment roll, the court found as facts, in addition to what is above stated, that *Fritz* and *Blankenburg* were co-sureties for Servatius on said notes; that *Blankenburg* so paid the amount of the judgment to the bank out of his own means, and took an assignment of said judgment to himself, and still held the same; and that *Blankenburg* had received no part of the money so paid from Servatius on or out of securities given by him for the debts, and held no security for the same. Upon the facts so found it was ordered, in effect, that *Blankenburg* release said *Fritz* from one half of said judgment and of the interest accrued thereon, by due entry on the docket in the manner requisite to the satisfaction of judgments, or by written release executed and filed in the court, and for costs; that the remaining half of said judgment stand as against *Fritz* unaffected thereby; that the whole judgment stand as

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against Servatius unaffected thereby, and that *Blankenburg* have all the same rights and remedies thereon, as against him, as he had before the making of such order.

October 31, 1885, *Fritz* gave notice of motion to be made November 10, 1885, based upon his affidavit and an affidavit of Charles E. Shepard, and upon all the files and records therein, for an order setting aside said order of August 15, 1885. Upon the hearing of that motion, affidavits of *Blankenburg* and Servatius were read in opposition thereto, and thereupon, on November 17, 1885, it was ordered by the court, in effect, that said motion be, and the same was thereby, denied, with costs. January 16, 1886, and in compliance with the order of August 15, 1885, *Blankenburg* satisfied said judgment as against *Fritz* to the extent of one half thereof.

Upon an affidavit of *Blankenburg* showing the facts, and that *Fritz* had paid no part of the judgment, and that Servatius was insolvent, and that no execution had ever been issued thereon, and that the judgment remained unsatisfied and due as against *Fritz* to the extent of one half thereof and interest, and on May, 15, 1886, it was ordered by the court, in effect, that leave be, and the same was thereby, granted for execution to issue on the judgment against the property of said *Fritz* and in favor of said *Blankenburg*, for $1,017.52, with interest thereon from February 14, 1878; and in pursuance thereof execution, reciting the facts stated and orders made, was issued thereon for said last-named amount May 17, 1886, and the same was returned wholly unsatisfied July 27, 1886. July 29, 1886, upon verified petition stating the facts and upon the judgment and proceedings had, it was ordered by the court, in effect, that leave be, and the same was thereby, granted for an *alias* execution to issue on said judgment against the property of *Fritz* for the same amount as the other, in favor of *Blankenburg*, and the same was thereupon issued and levied upon

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real estate. August 20, 1886, *Fritz*, on an affidavit of his attorney stating the issuance of said *alias* execution and said levy, and upon the judgment roll and all the papers on file and the record in the action, gave notice of motion to be made August 30, 1886, to set aside, vacate, and annul said *alias* execution and all subsequent proceedings thereon, and to satisfy said judgment of record as to *Fritz*, etc. Upon the hearing of that motion, an affidavit of *Blankenburg* was read as to the location and occupancy of said real estate, and thereupon, and on September 8, 1886, as of August 30, 1886, it was ordered by the court, in effect, that said motion be, and the same was thereby, denied, with $10 costs to be paid by *Fritz* to said *Blankenburg*. From said last-mentioned order *Fritz* appeals.

A. M. Blair, for the appellant, contended, *inter alia*, that the payment of a joint judgment against two or more by one of the judgment debtors extinguishes the judgment for all purposes, and an assignment thereof is void. *Harbeck v. Vanderbilt*, 20 N. Y. 395; *Bank of Salina v. Abbot*, 3 Denio, 181; *Ontario Bank v. Walker*, 1 Hill, 652; *Booth v. F. & M. Nat. Bank*, 74 N. Y. 228; *Townsend v. Whitney*, 75 id. 425; *Hammatt v. Wyman*, 9 Mass. 138; 17 id. 154; *Morley v. Stevens*, 47 How. Pr. 228; *Russell v. Hugunin*, 2 Ill. 562; *Tompkins v. Fifth Nat. Bank*, 53 id. 57. As between themselves, *Fritz* and *Blankenburg* were joint contractors and joint judgment debtors.

N. C. Giffin, for the respondent, cited *Goodyear v. Watson*, 14 Barb. 481; *Cuyler v. Ensworth*, 6 Paige, 32; *Eddy v. Traver*, id. 521; *Mathews v. Aikin*, 1 N. Y. 595; *Norton v. Coons*, 3 Denio, 130; *Starr v. Ellis*, 6 Johns. Ch. 393; *Barnes v. Camack*, 1 Barb. 392; *Cole v. Malcolm*, 66 N. Y. 366; *Twombly v. Cassidy*, 82 id. 158; *Springer's Adm'rs v. Springer*, 43 Pa. St. 518; *La Farge v. Herter*, 11 Barb. 164; *Morris v. Evans*, 2 B. Mon. 84; 5 Wait's Act. and Def. 217; *Douglas v. Waddle*, 1 Ohio, 413; *Smith v. Rumsey*, 33 Mich. 183;

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Kelly v. Page, 7 Gray, 213; *Mason v. Pierron*, 63 Wis. 239; *Townsend v. Whitney*, 75 N. Y. 429–30.

CASSODAY, J. We have carefully examined the numerous cases cited by the respective counsel, and many others. The contrariety in the opinions of different courts may, to some extent, be reconciled by a strict regard to the particular facts inducing each particular expression of opinion, and whether such utterance had reference to the respective *rights* of the parties or only to the proper *remedy* for the determination and enforcement of such rights. These distinctions may be fairly illustrated by the case at bar. Servatius was the maker of both notes, and primarily liable thereon. *Fritz* and *Blankenburg* were co-payees and co-accommodation indorsers. Servatius negotiated the notes, and had the avails thereof. Upon the making, indorsement, and negotiation of the notes at the bank, the three defendants became jointly and severally bound by their *express contract* to pay to the bank the amount of the principal and interest mentioned in the notes, or any judgment which might be recovered thereon. Though not fully expressed in words, yet in making the contract the relations of the defendants to each other were such that there arose therefrom, as between themselves, by implication of law, two conditional contracts or obligations,—one to the effect that if said co-indorsers or either of them paid said indebtedness or any judgment thereon or any part thereof, then Servatius would repay to him or them the amount so paid, with interest; the other, to the effect that, if either of such co-indorsers paid thereon more than the other, then such other would reimburse him to the extent of one half of such excess, and interest thereon. But such implied contracts or obligations were, necessarily, to remain conditional until such payment or payments should be made—then to become absolutely binding. Such were the legal

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rights and liabilities of the defendants as between themselves.

Upon the rendition and docketing of the judgment the same became a lien upon the real estate of *Fritz* in question, but probably without the knowledge of the bank or *Blankenburg*. Servatius was insolvent. *Blankenburg* was compelled to pay to the bank the whole amount of the judgment, which was then satisfied as to him, and he thereupon took from the bank an assignment in writing of the judgment, and then filed the same with the records of the case, and the fact was then noted in the docket of the judgment as stated. It is now claimed that such judgment thereby became fully paid and completely extinguished as to each and all of said defendants, and hence ceased to be any longer a lien upon said real estate. Of course, when the bank received from *Blankenburg* the full amount due on the judgment, its interest therein was thereby necessarily terminated and extinguished. By such payment the *expressed* provisions of said contracts, by which all the defendants became bound to the bank and upon which said judgment was based, became satisfied, so far as the bank was concerned. Numerous cases are cited by the learned counsel for the appellant, holding that at law such payment operated as a satisfaction and discharge of the judgment, notwithstanding such assignment. Others might be cited to the same effect. This rule is, to some extent, modified by the statute declaring, in effect, that the release of a joint debtor "shall operate as a satisfaction or discharge of such joint debt only to the amount of the proportion which the person so released ought in equity, as between himself and the other joint debtor or debtors, to pay: . . . provided . . . that, if the person released is only a surety, his release shall operate as a payment of such joint debt to the extent of the money actually paid by him to procure his release, and no further." Sec. 4204, R. S. But such pay-

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ment by no means operated as a satisfaction or discharge of either of such implied contracts or obligations. On the contrary, it was the very condition which was to make, and did make, each of them absolutely binding. Besides, it did not operate to satisfy or discharge the express promise of Servatius to pay the amount of the notes to the other defendants as co-payees. Upon the payment by *Blankenburg*, that express promise became binding to him.

The only difficulty is in the method of enforcement. The question recurs, How are such absolute rights or obligations, thus secured to *Blankenburg* by virtue of such implied contract and payment, to be enforced against *Fritz* and the land in question? Did *Blankenburg* succeed to the judgment lien upon the land held by the bank, by virtue of the assignment, or by way of subrogation, or not at all? The difficulties in the way of enforcing the same at law by execution issued directly upon the original judgment have already been pointed out and are apparent. By paying the amount of the judgment and taking the assignment, *Blankenburg* did not and could not, *as against Fritz*, acquire the same right to the full amount of the judgment as had been possessed by the bank, although he may have acquired such right as against Servatius. Sec. 4205, R. S. The amount which *Blankenburg* had the right to recover, as against *Fritz*, could not be ascertained from the judgment itself. Such right was not determined by the judgment, for it only accrued and became absolute by the payment made more than four years after the rendition of the judgment. The facts which secured to *Blankenburg* such right as against *Fritz*, existed largely *dehors* the judgment. These things show the necessity of an authoritative determination of the respective rights and liabilities of such co-accommodation indorsers as between themselves, before any process should issue to enforce them. This could only be done, independent of statute, by a hearing of the respective parties in

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court and an adjudication of their respective rights and liabilities therein.

It has been determined by this court that the right of a surety or such co-accommodation indorser to be subrogated to the remedies of the judgment creditor, is a matter cognizable by a court of equity. *Mason v. Pierron*, 63 Wis. 244. Mr. Justice LYON there said: "The extent to which subrogation may be decreed has been a matter of some conflict between the courts of this country and of England. It was formerly held in England, following the Roman law, that a surety subrogated to the rights of a creditor had precisely the same rights the creditor had, and stood in his place; but in later times the rule has been restricted in that country, and it is there now held that the right of subrogation extends only to securities other than the obligation or instrument which is the evidence of the debt. . . . The courts of this country, however, have very generally adhered to the ancient rule, and hold that although the lien or obligation be extinguished at law by the payment of the debt, yet, for the benefit of the surety, it continues in equity in full force. This is believed to be the more just and reasonable rule." In support of this proposition numerous cases might be cited. See *Fleming v. Beaver*, 2 Rawle, 128, 19 Am. Dec. 629; *Edgerly v. Emerson*, 23 N. H. 555; *Brewer v. Franklin Mills*, 42 N. H. 292; *New Bedford Inst. v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289. In the New Hampshire cases cited, an attachment of the property of the principal debtor was kept alive for the benefit of the surety who paid the debt and took an assignment of the cause and right of action. As observed in *Mason v. Pierron, supra*, "the American rule is fully recognized in our statute, which prescribes the procedure by which one of several judgment debtors, who has paid more than his just share of the judgment, may keep the judgment alive and retain the lien thereof upon the land of the other judg-

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ment debtors for the purpose of enforcing contribution by the latter." Secs. 3021–3024, R. S. These statutes assume the continuance of the lien *at law* for at least twenty days after payment, without anything being done, and then provide a way for preserving such a lien at law by simply filing an affidavit. But such remedy is accumulative, and does not take away the right which previously existed of enforcing the same as between the parties by apt proceedings in equity. *McDaniel v. Lee*, 37 Mo. 206. It was there said, in effect, that prior to the statute in that state a surety who had paid the debt had a remedy against his co-sureties either by bill in equity to enforce contribution against all, or he might proceed against each separately at law for his proportionate share of the excess paid; and since the statute he also had a summary remedy by motion for judgment for such proportionate share of the excess.

It being thus established that in equity a defendant surety, on payment of the original judgment, is subrogated to the rights of the judgment creditor, especially where, upon making such payment, an assignment of the judgment is taken to keep alive the security as here, it only becomes necessary to consider whether the proper remedy has been resorted to in the case at bar. Ordinarily, to secure the benefit of such judgment lien against such co-surety or co-accommodation indorser, the one paying the amount of the judgment should proceed by bill, suit, petition, or some proceeding in equity, wherein the equitable rights of the respective parties may be adjudicated and enforced. *Cuyler v. Ensworth*, 6 Paige, 32; *Speiglemyer v. Crawford*, 6 Paige, 254; *Goodyear v. Watson*, 14 Barb. 481; *Townsend v. Whitney*, 75 N. Y. 425; *Smith v. Rumsey*, 33 Mich. 183; *Neal v. Nash*, 23 Ohio St. 483; *Furnold v. Bank of State*, 44 Mo. 336; *Lidderdale's Ex'rs v. Robinson's Ex'rs*, 12 Wheat. 594. But such relief has been granted by order of the court upon hearing of the parties. *Springer's Adm'rs v. Springer*, 43

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Pa. St. 518. Thus, in *McDaniel v. Lee*, 37 Mo. 206, the non-paying joint debtors sought relief upon petition in a court of equity, and it was held, in effect, that although the proceedings were irregular yet, as the court had thereby acquired jurisdiction over the subject matter, it would retain it and do full justice between the parties by enforcing contribution according to their equitable rights. So here, August 15, 1885, *Fritz* invoked the equitable powers of the court to relieve him from the judgment by fully satisfying and discharging the same. *Blankenburg* resisted the motion, and after a full investigation and hearing the court found the facts as stated, and ordered, in effect, the judgment released as to one half as against *Fritz*, but binding against him and in favor of *Blankenburg* for the payment of the other half by way of contribution. Not satisfied with such order, which seems to have been in strict accordance with the equitable rights of the parties, *Fritz*, upon new affidavits, renewed, substantially, the same application, and, after full hearing upon the merits, that motion was denied, November 17, 1885, as stated. No appeal was taken from either of those orders, and both, and the affidavits upon which they were respectively based, appear in the record. The original and *alias* executions, which were each subsequently issued upon leave granted by the court, recited the orders as stated. The motion to set aside the *alias* execution and proceedings under it, was, in effect, to renew, open, and reconsider what was thus twice before solemnly determined, and, as we think, was properly denied. *Fritz*, having thus had a full hearing in a proceeding equitable in its nature and apparently just, must be regarded as concluded.

By the Court.— The order of the circuit court is affirmed.

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McFarland, Plaintiff in error, vs. The State, Defendant in error.

February 8 — March 1, 1887.

Criminal law and practice: Former conviction procured by fraud: Plea of former conviction not an admission of guilt.

1. Where a person liable to be charged criminally, by fraud procures himself to be convicted of the offense, such conviction is no bar to another prosecution, except, perhaps, where the full penalty of the law has been imposed and suffered.
2. A defendant pleaded not guilty, also a former conviction. A trial of the issue formed on the latter plea resulted in a verdict that the former conviction was procured by fraud and collusion and was no bar to the prosecution. *Held*, that a conviction could not follow from such verdict, without a trial upon the issue made by the plea of not guilty.

ERROR to the Circuit Court for *Dane* County.

The plaintiff in error, *William A. McFarland*, was prosecuted before a justice of the peace at Deerfield in Dane county, for selling liquor without license. One Nelson appeared as his attorney. For some reason this prosecution was discontinued. On the day it was so terminated, the chairman of the board of supervisors of the town in which the offense is alleged to have been committed came to Madison and renewed the prosecution in the municipal court, by making due complaint against *McFarland* for the same offense.

On the same day, *McFarland* and Nelson and one Monson went before one Allen, a justice of said county at Cambridge, and there Monson, at the request of Nelson, made complaint against *McFarland* for the same offense. A warrant was issued, and *McFarland* was arrested by a constable and brought before the justice. He pleaded guilty to the charge in the complaint, and the justice fined him $10 and costs, which he paid and was discharged from custody.

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He was subsequently arrested on a warrant issued by the municipal court upon the complaint of the chairman, was arraigned in that court, pleaded not guilty, and was tried and convicted of the offense charged. He thereupon appealed to the circuit court. When the cause was called for trial in that court, he was permitted to plead his conviction before Justice Allen for the same offense in bar of the prosecution. The district attorney, on behalf of the state, replied that such conviction was procured by the fraud and collusion of the accused. The issue thus made on the special plea was tried before a jury, who rendered a verdict thereon for the state as follows: "We, the undersigned jury, impaneled to try the issue in this case made upon the complaint, plea, and replication, find that the former prosecution and conviction pleaded in bar was had, but that it was procured by fraud and collusion upon the part of the defendant and is no bar to this prosecution. We therefore find the defendant guilty." There was no trial of the issue made by the plea of not guilty. That plea was not withdrawn when the special plea was interposed. The court held that judgment of conviction must go against the accused on the above verdict, on the ground that the special plea was a conclusive admission of his guilt. Thereupon motions in arrest of judgment and for a new trial were overruled by the court, and the accused was adjudged to pay a fine of $10 and costs. He has sued out a writ of error from this court to obtain a review and reversal of such judgment.

For the plaintiff in error there was a brief by *Hall & Rogers*, and oral argument by *Mr. Rogers*. To the point that the court erred in refusing to submit to the jury the question of defendant's guilt on the merits, they cited 1 Wharton's Crim. Law, secs. 530*a*, 568, 572; *Comm. v. Goddard*, 13 Mass. 455; *Comm. v. Robinson*, 126 id. 259; *Hirn v. State*, 1 Ohio St. 16; *Barge v. Comm.* 3 Pen. & W. 262;

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Foster v. Comm. 8 Watts & Serg. 77; *Solliday v. Comm.* 28 Pa. St. 13; *Nonemaker v. State*, 34 Ala. 211.

The *Attorney General*, for the defendant in error, argued, *inter alia*, that at common law a special plea in bar, either of "*autrefois convict*" or "*autrefois acquit*," was final and judgment was passed upon the determination of the plea. This rule was relaxed in the case of felonies but is still held in England in case of misdemeanors. *King v. Taylor*, 3 B. & C. 502; *King v. Gibson*, 8 East, 107. This rule seems to have been followed in several of the states. *State v. Epps*, 4 Sneed, 552; *State v. Green*, 16 Iowa, 240. And the rule has been frequently applied upon a plea of abatement where issue of fact is joined. *Comm. v. Carr*, 114 Mass. 280; *Guess v. State*, 6 Ark. 147. The rule seems to be that the defendant in a misdemeanor can have but one trial upon a question of fact, and that if he pleads a false special plea, final judgment goes against him. *State v. Allen*, 1 Ala. 442. If the distinction of the special plea being overruled as a matter of law upon demurrer, and the trial of a false plea as an issue of fact, is kept in view, it will serve to reconcile most of the authorities otherwise seeming to conflict. See *Barge v. Comm.* 3 Pen. & W. 262.

LYON, J. 1. It is a rule of the common law, founded on a plain principle of natural justice, that no person shall be twice put in jeopardy of punishment for the same offense. This rule is embodied and perpetuated in both the federal and state constitutions. One application of the rule is that a regular conviction or acquittal upon a prosecution for a crime, if pleaded, is a bar to a second prosecution for the same offense.

But if one liable to be charged criminally, by fraud procures himself to be acquitted or convicted of the offense, such acquittal or conviction is no bar to another prosecution therefor. Whart. Crim. Pl. § 451. Bishop, in his

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treatise on Criminal Law, says: "If one procures himself to be prosecuted for an offense which he has committed, thinking to get off with a slight punishment and to bar any future prosecution carried on in good faith, if the proceeding is really managed by himself, either directly or through the agency of another,— he is, while thus holding his fate in his own hands, in no jeopardy. The plaintiff state is no party in fact, but only such in name. The judge is imposed upon, indeed, yet in point of law adjudicates nothing. . . . The judgment is therefore a nullity, and is no bar to a real prosecution." Vol. 1, § 1010. It is probable, however, that if in such collusive and fraudulent prosecution the full penalty of the law for the offense has been imposed and paid or suffered by the accused, it would be a bar to a second prosecution for the same offense.

On this subject the learned circuit judge instructed the jury as follows: "If the defendant in this case procured the complaint in the case, which has been pleaded in bar, to be made by a person acting in collusion with him, or with the attorney of the defendant with the defendant's sanction, and with the expectation upon the part of the defendant of deriving some benefit from it by getting off better than by another prosecution, or thinking to avoid a prosecution which he thinks may be more serious to him, or with a design to avoid another prosecution the result of which he thinks might be more serious to him, then it is no bar." We think this instruction is a correct statement of the law. The testimony amply supports the verdict of the jury in that behalf. Thus far we find no error in the record.

2. The last sentence of the verdict — "We therefore find the defendant guilty" — is a mere conclusion of law from the finding that the prosecution and conviction before Justice Allen was collusive and fraudulent. It is not in any correct sense a verdict of guilty on the merits, and has no significance in the determination of the case. It was but a

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repetition of the ruling by the court on the trial, to the effect that a conviction of the offense charged must necessarily result from a verdict overruling the plea of *autrefois convict.* This brings us to inquire whether the plaintiff in error was properly convicted of the offense charged, without a trial of the issue of his guilt or innocence, when his plea of not guilty stood upon the record.

In England the rule adopted by the circuit court seems to prevail in prosecutions for misdemeanors, and it has been followed to a limited extent in this country; but the great weight of American authority is against it. We do not think the English rule rests upon any sound principle. Why a man should be held to have conclusively admitted himself guilty of an offense for which he is being prosecuted, merely because he avers that he has theretofore been prosecuted for the same offense and acquitted or convicted thereof and fails to prove it, we cannot comprehend. The verdict against him on such special plea is simply that he was not theretofore so acquitted or convicted of the offense charged. By what rule of logic or legal presumption can it be said that, because he asserts an acquittal or conviction therefor, which the jury negatives, he conclusively admits his guilt of the offense charged, or must be conclusively presumed guilty thereof? The plea of guilty before Justice Allen may perhaps be proved, when the case is tried on the merits, as an admission of the accused, to go to the jury for what it is worth like any other admission of a party against his interest; but to allow the state to repudiate the proceeding before Justice Allen, and treat it as a nullity, and still hold that the guilt of the accused is conclusively established by such proceeding, would be most illogical and unjust.

Take another view of the question. The rules governing the two pleas of *autrefois acquit* and *autrefois convict* are the same. *State v. Parish*, 43 Wis. 395. Now, suppose one criminally charged pleads that he has theretofore been tried

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for the same offense and acquitted. The state takes issue on the plea, and the jury find that he has not been so tried and acquitted. The utter injustice, as well as absurdity, of convicting the accused on these proceedings, without further inquiry of the crime charged, is obvious. Such proceedings fail to establish a single element of guilt. Yet the English rule demands and upholds such convictions. We adopt the opposite rule, and hold, with most of the courts of this country, that the court erred in pronouncing judgment of conviction without a trial of the issue made by the plea of not guilty. On this subject, see Whart. Crim. Pl. §§ 420, 421, 486, and the numerous cases there cited.

By the Court.—The judgment of the circuit court must be reversed; but inasmuch as the issue on the special plea has been regularly determined, the cause will be remanded for a trial of the issue made by the plea of not guilty, unless different pleadings be interposed by leave of that court which will render a trial unnecessary.

See note to this case in 32 N. W. Rep. 226.— REP.

ATKINSON, Respondent, vs. HARRAN, Appellant.

March 1—March 22, 1887.

Assault and battery: Pleading: Justification: Special damages.

1. Justification for an assault and battery should be specially pleaded.
2. In an action for an assault and battery, although special damages are not alleged, yet, if evidence thereof was admitted without objection it may be considered by the jury, and the complaint may be considered as amended accordingly.

APPEAL from the Circuit Court for *Kewaunee* County.

The case is stated in the opinion.

For the appellant there was a brief by *Hudd & Wigman*,

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and oral argument by *Mr. Wigman.* They contended, *inter alia*, that the defendant was entitled to have the defense of his personal property considered by the jury. 2 Addison on Torts, 693; 1 Hilliard on Torts, 204–6; Cooley on Torts, 167; 3 Bl. Comm. 120; *Ayres v. Birtch*, 35 Mich. 501; *Abt v. Burgheim*, 80 Ill. 92; *Green v. Goddard*, 2 Salk. 641; *Gates v. Lounsbury*, 20 Johns. 427. The rightful owner of personal property cannot retake it from a wrong-doer by force, and the latter may justify a battery in defense of his possession. *Barnes v. Martin*, 15 Wis. 240; *Huppert v. Morrison*, 27 id. 365; *Andre v. Johnson*, 6 Blackf. 375.

For the respondent there was a brief by *John C. & A. C. Neville*, and oral argument by *Mr. A. C. Neville.*

TAYLOR, J. This is an action to recover damages for an assault and battery alleged to have been committed by the appellant upon the respondent. The pleadings were the complaint and an answer simply denying the allegations of the complaint. The action was commenced in a justice's court. A judgment was rendered in favor of the plaintiff in such court; and upon an appeal by the defendant to the circuit court, upon a new trial in that court, a judgment was again rendered against the defendant in favor of the plaintiff, and from that judgment an appeal was taken by the defendant to this court.

The only errors assigned by the appellant are: "(1) That the court erred in charging the jury that no justification was shown, or was attempted to be shown, by the defendant, and that the only question for their determination was the amount of damage the plaintiff had sustained. (2) That the court erred in charging the jury that the plaintiff was entitled to recover for injuries to his clothing as an element of damages."

As to the first error assigned, the evidence conclusively shows that the defendant assaulted the plaintiff, knocked

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him down, and inflicted considerable injury upon the person of the plaintiff. The defendant himself admits that he struck the plaintiff before he was assaulted by him in any way. But he claims he assaulted and struck plaintiff in order to prevent him from taking from his possession two steers which defendant then owned and had in his actual possession, and for that reason he was justified in assaulting the plaintiff. We think the appellant's evidence wholly fails to show that at the time he struck the respondent it was necessary to do so in order to protect himself in the possession of said steers; and in the second place, by his answer he had not set up any justification for his assault upon the plaintff, and was not, therefore, entitled to have such justification presented to the jury as a defense to the action of the plaintiff.

The appellant insists, however, that if, under his answer, he would not have the right to give evidence to justify his assault upon the plaintiff, still the evidence which he now claims was a justification, or which at least tended to prove a justification, was given on the trial and received without objection; and that he was entitled, therefore, to the same benefit of it as though he had set up a justification in his answer. Admitting the correctness of this claim made on the part of the learned counsel for the appellant, we are of the opinion that the learned circuit judge was right in holding that the evidence on the part of the defendant did not show any justification for the assault. Nor was it of such a character as to make it incumbent upon the court to submit the question of justification to the jury. Taking all the evidence in the case, it shows a violent and wholly unjustifiable assault upon the plaintiff by the defendant, without any pretense of necessity on his part to make it in defense of his property.

As to the second alleged error, it is true that in his complaint the plaintiff does not set out, as an item of damage,

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that his clothes were injured or destroyed by the assault of the defendant; but the evidence was admitted without objection, and it was not error to instruct the jury to take into consideration, in fixing the amount of plaintiff's damages, the injury done to his clothing. The evidence was before the jury without objection, and the complaint may be considered as amended so as to cover the claim for injury to plaintiff's clothing.

By the Court.—The judgment of the circuit court is affirmed.

MULLEN and others, Appellants, vs. REINIG, Garnishee, etc., Respondent.

March 1—March 22, 1887.

New trial: Discretion: Appeal to S. C.: Bill of exceptions.

1. The granting of a new trial at the cost of the defeated party is within the discretion of the trial court, and its order will not be reversed unless there was a manifest abuse of such discretion, or unless it affirmatively appears from the record that the order was based upon a misapprehension of law.
2. The reasons for granting a new trial, as delivered in writing by the trial judge, are not a part of the record unless they are shown by the certificate to the bill of exceptions to have been made a part thereof.

APPEAL from the Circuit Court for *Fond du Lac* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

It appears from the record that, December 24, 1884, the defendant, Haberkorn, made a general assignment for the benefit of his creditors to the garnishee, *Reinig;* that December 26, 1884, the plaintiffs commenced an action against Haberkorn, and at the same time served garnishee summons and affidavit therein upon him and the garnishee, *Reinig;*

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that January 8, 1885, the garnishee appeared in the action by the service of notice of retainer by his attorneys therein; that on the same day the assignee by affidavit denied any indebtedness or liability to the defendant or having in his possession any of his property, credits, or effects; that January 10, 1885, the plaintiffs gave notice of their election to take issue on the answer of the garnishee; that Haberkorn put in no appearance and made no contest; that January 16, 1885, the plaintiffs recovered judgment in the principal action against Haberkorn for $558.23 damages and costs, and docketed the same; that, on the trial of the garnishee issues thus formed, the jury, under the charge of the court, found for the plaintiffs, and assessed their damages at $558.23, with interest at the rate of seven per cent. per annum from January 16, 1885; that thereupon, and at the same term of the court at which said trial was had and said verdict was rendered, and on motion of the attorneys for the garnishee therefor, made November 10, 1885, and after the hearing of counsel for the respective parties thereon, "and the court being fully advised," it was ordered by the court, in effect, January 4, 1886, that the motion for a new trial be, and the same was thereby, "granted, on the payment of ten dollars attorney's fees, clerk's fees of the term, and plaintiffs' costs and disbursements of the term, by the garnishee." From that order the plaintiffs appeal.

C. K. Pier, for the appellants.

Edw. S. Bragg, for the respondent.

Cassoday, J. The evidence taken upon the trial of the issues in garnishment, and preserved in the bill of exceptions and printed case, is quite voluminous. An elaborate argument was made upon the merits at the bar, and a like argument is presented in the printed brief of the learned counsel for the plaintiffs, to the effect that the verdict was fully justified by the evidence, and hence was improperly

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set aside. In relation to that it is enough to say that the evidence in favor of the plaintiffs is not so conclusive of fraud as to justify this court in holding that the order setting it aside and granting a new trial was an abuse of discretion. Besides, some error may have intervened, or some other satisfactory reason, not apparent to us from the record, may have induced the making of the order. The recital in the order, of "the court being fully advised" when it made the same, precludes the assumption of its being made without good reason merely because none is apparent to us from the record. It is to be remembered that the setting aside of a verdict, and granting of a new trial, at the term of its rendition and at the cost of the party beaten, as here, is not only within the discretion of the trial judge, but, as a general rule, his action will not be reversed unless it clearly appears from the record that there has been an abuse of such discretion. *Evans v. Rugee*, 63 Wis. 31; *McLimans v. Lancaster*, 57 Wis. 297; *Seaman v. Burnham*, 57 Wis. 568, and cases there cited. The only exception to this rule is where it affirmatively appears upon the record that such order was based upon a misapprehension of the law. *Fairbanks v. Holliday*, 59 Wis. 80, and cases there cited. Such misapprehension, when thus made to appear, is an error of law which obviates the necessity of determining whether there was any such abuse of discretion. *Smith v. Dragert*, 61 Wis. 223. Counsel seek to bring this case within such exception. But neither the motion nor the order states, or purports to state, the grounds, or any ground, upon which the motion was based. A motion based upon irregularities usually specifies particularly the irregularity complained of. Sec. 1, Circuit Court Rule XI. When an order of the court or judge is based upon any record, petition, affidavit, or other paper, read or used upon the hearing, it is required to be referred to therein. Sec. 6, Circuit Court Rule XI. As this order contains no such reference, we must assume

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that it was based upon the minutes of the court and the proceedings, or some proceeding or occurrence upon or connected with the trial or motion and not of record.

Counsel claim the case to be within the exception stated, and this is based upon what is said to be "the reasons and grounds for setting aside the verdict of the jury as made in writing by the trial judge." But the only certificate of the trial judge making anything of record in the case is in the words and figures following: "And because the said *evidence, rulings*, and *charges, requests*, and *exceptions* hereinbefore set forth and mentioned, do or do not appear upon the record of said trial in said action, therefore the said judge hath to this bill of exceptions, after due notice to the defendant's attorneys, set his hand and seal and made the same hereby a part of the record in said cause; and doth hereby certify that this bill of exceptions, settled this day, contains all the *evidence* given, *charge* given, and *requests, rulings, objections, and exceptions* made on the *trial* of said cause, and minutes of the court, and pleadings *necessary to the issues involved.* Witness the official signature of Hon. N. S. Gilson, the trial and circuit judge, this 22d day of March, 1886. N. S. Gilson, Judge."

This certificate does not purport to make the "reasons" or "grounds" for setting aside the verdict a part of the record. We have no power to enlarge the scope of the certificate or remake the record. Of course, there are certain papers, including the pleadings and order appealed from, which are of record without any bill of exceptions or certificate of the trial judge. But none of the evidence, charge, instructions, requests, rulings, objections, exceptions, reasons, statements, or proceedings upon the trial or motion for a new trial, are a part of the record unless made so in the manner provided by statutes, rules of court, or practice. It follows that while the ruling of the court in setting aside the verdict and granting a new trial is

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made a part of the record by the certificate of the judge, yet none of his reasons or grounds for so doing are made part of the record, and hence they are not before us for consideration. *Bunn v. Valley Lumber Co.* 63 Wis. 630. Certainly such "reasons and grounds" are no part of the evidence, charge, requests, rulings, objections, or exceptions made on the trial of the cause, and minutes of the court. Besides, the trial court may have had other reasons than those mentioned for making the order complained of. It may be questionable whether an assignee, under an assignment void upon its face or for a fraud in which he participated, would be protected for expenses in defending the same. But the question is not here, and we express no opinion upon it. Since the record does not make it appear affirmatively that the order was based upon any misapprehension of law, we cannot hold that there was any error of law in making it.

By the Court.— The order of the circuit court is affirmed.

CHASE, Respondent, vs. GAULT and another, Appellants.

March 1 — March 22, 1887.

(1) Contracts: Usage: Instructions to jury. (2) Costs.

1. Plaintiff sold machinery for the defendants on commission, but such machinery, not being paid for, had to be taken back. In an action for the commission on the sale, defendants claimed that the contract as to compensation was conditional, and that where the machinery had to be taken back no commission was to be paid. A usage to that effect was proven, but the evidence as to whether the contract was conditional or not was conflicting. The instructions (stated in the opinion) are *held* to have fairly submitted that question to the jury, and not to have been misleading.
2. Under subd. 6, sec. 2918, R. S., as amended by ch. 52, Laws of 1881, if the plaintiff in an action on contract brought in the circuit court recovers more than $100, he is entitled to costs, even though the action was within the jurisdiction of a justice of the peace.

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APPEAL from the County Court of *Fond du Lac* County.

Action to recover the sum of $150, alleged to be due to the plaintiff as his commission for procuring a purchaser for certain machinery. The facts will sufficiently appear from the opinion. There was a verdict for the plaintiff, and from the judgment entered thereon the defendants appealed.

The cause was submitted for the appellants on the brief of *O. A. Wells*, attorney, and *A. M. Blair*, of counsel, and for the respondent on that of *Edward W. Phelps*.

For the appellants it was contended, *inter alia*, that construing together subd. 3, 7, sec. 2918, R. S., and subd. 6, as amended by ch. 52, Laws of 1881, the plaintiff in an action on contract should not be allowed costs, even though he recovered $100 or more, if a justice of the peace had jurisdiction.

COLE, C. J. This case involves mainly a question of fact. The plaintiff sues to recover his commission for finding a purchaser for some machinery for a saw-mill. It is undisputed that he found such a purchaser for the defendants; and he testified to an unconditional promise on their part to pay him $150 for his services. The defendants contend that the contract as to compensation was conditional, and that he was not to be paid anything in case the property sold was not paid for but had to be taken back by the vendor, as the machinery in question was. *Mr. Briggs*, one of the defendants, testified that he made the contract with the plaintiff, and that the agreement was that the plaintiff was to be paid out of the proceeds of the sale as they were collected, and that he read to the plaintiff the commission clause in the contract which the defendants had with the manufacturers, so that he might know how he was to get his commissions. According to this clause, commissions were collectible when the machinery was wholly or in part

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paid for, and in certain proportions as the proceeds of sales were collected. And a custom or usage of trade was proven, to the effect that where an agent sells machinery on commission, and by reason of default of payment by the purchaser the manufacturer was compelled to repossess himself of the property, the agent received no commission. The evidence as to whether the contract for the payment of commissions was absolute or conditional was quite conflicting, but we think was fairly submitted to the jury.

Exceptions were taken to certain portions of the charge of the trial court, on the ground that they were misleading or were calculated to confuse the jury. The learned judge said the defendants allege "a custom of a machinery sale trade, to the effect that commissions on sales shall only be collectible after the machinery is wholly or in part paid, and in certain proportions as the proceeds of sales are collected; and if the property sold is not paid for and has to be taken back by the party selling, that the agent making the sale shall not be entitled to any commission." Now, it is said that there was no claim that there was any usage how the commission was to be paid when the machinery was paid for, but that it only applied when the machinery was not paid for. It was an undisputed fact that the machinery in this case was wholly or in part unpaid for and had to be taken back by the vendors. Therefore, whatever was said about the custom could only refer to the case where the property was taken back by the vendor, and could not possibly have misled the jury; for the only question was whether the contract as to compensation was absolute or conditional,— made without a reference to the custom. The county judge said that the usage itself had been fully established by the evidence, and there was a presumption when the usage was proved that the plaintiff made his contract in relation to it, and that the payment of his commission for finding a purchaser for the saw-mill machinery

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was to be according to the terms of such usage; but this presumption was not conclusive, and might be rebutted by evidence on the part of the plaintiff that he did not contract in reference to such usage, but did contract to receive $150 unconditionally, uncontrolled by such usage. True, the court subsequently directed the jury, in substance, that the question of custom was not to be taken into consideration unless the defendants had shown, by a fair preponderance of evidence, that the contract was made with reference to such custom,— in other words, had shown that it was not absolute; but we do not think that this could have confused the jury in any way.

At the time the sale of the machinery was completed, the defendant *Briggs* gave the plaintiff an order on the manufacturers for his pay. The jury were told that unless they found that the plaintiff received this order understandingly in satisfaction of his commissions, it would not bar a recovery. The plaintiff explained the circumstances under which he received the order, and the jury must have found that it was not accepted as a conditional payment of his claim.

In this case the complaint was verified, and the amount recovered was $174.63. The plaintiff's costs were taxed at $15 attorney's fees, and $20.10 for disbursements. This was correct under sec. 2918, as amended by ch. 52, Laws of 1881, and sec. 2921, R. S.

By the Court.— The judgment of the county court is affirmed.

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NICHOLLS, Plaintiff in error, vs. THE STATE, Defendant in error.

March 1 — March 22, 1887.

CRIMINAL LAW AND PRACTICE. *(1) Pleading: Burglary in day time. (2, 3) Constructive breaking. (4) Express car: "Railroad freight car." (5) Proof of ownership. (6) Failure of accused to be sworn: Comment by prosecutor: Presumption.*

1. An information charging the breaking and entering of a freight car, but not stating whether it was in the day time or night time, is *held* sufficient under sec. 4410, R. S., as charging a breaking and entering in the day time.
2. Defendant secreted himself in a box which he procured to be placed by the agents of an express company in an express car. His intention was to rob the car. *Held*, that this was a constructive breaking.
3. Sec. 4411, R. S., does not supersede the common-law doctrine of constructive breaking, but merely enlarges its scope in some respects.
4. An information charging the breaking and entering of a "freight and express car of the American Express Company," sufficiently charges the offense to have been committed in a "railroad freight car," within the meaning of sec. 4410, R. S.
5. Under such an information, proof of the exclusive possession, occupancy and control of the car by the express company, is sufficient proof of ownership.
6. In the argument of a criminal case the district attorney animadverted to the jury upon the fact that the prisoner had not been sworn. Objection was made, and the trial court ruled: "It is probably competent to show that the offense has not been denied." The undisputed evidence included the prisoner's voluntary admissions of guilt. The record does not show the language used by the district attorney, or the occasion for it. *Held*, that it must be presumed that something occurred or was said which rendered the remark proper.

ERROR to the Circuit Court for *Jackson* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

The plaintiff in error was tried and convicted of the offense charged in the second count of the information, to the

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effect that July 25, 1885, at the county of Jackson, in said state, the said *Nicholls*, the freight and express car of the American Express Company there situate, then and there unlawfully, feloniously, and burglariously did break and enter, with intent then and there the goods, chattels, and property of the said American Express Company, then and there in the said freight and express car being found, then and there feloniously and burglariously to steal, take, and carry away, against the peace and dignity of the state of Wisconsin. Upon the verdict of guilty being returned, the prisoner moved the court in arrest of judgment thereon, for the reason that the information did not charge the prisoner with any criminal offense known to the law in this state; which motion was denied, and the prisoner excepted. Judgment was thereupon rendered, and sentence imposed upon the prisoner to the effect that he be confined at hard labor in the state prison for the term of three years. To reverse that judgment the prisoner sued out this writ of error.

H. W. Barney and *John Turner*, for the plaintiff in error, to the point that the trial court erred in ruling that it was competent for the district attorney to animadvert upon the fact that the accused was not sworn in his own behalf, and in intensifying that ruling by saying: "It is probably competent to show that the offense has not been denied," cited sec. 4071, R. S.; *Comm. v. Nichols*, 114 Mass. 285; *Comm. v. Harlow*, 110 id. 411; *Comm. v. Scott*, 123 id. 239; *Crandall v. People*, 2 Lans. 309; *Ruloff v. People*, 45 N. Y. 213; *People v. Tyler*, 36 Cal. 522; *Calkins v. State*, 18 Ohio St. 366; *Long v. State*, 56 Ind. 182. The accused pleaded not guilty, and yet, because he was not sworn, the court tells the jury that he has not denied the offense.

The *Attorney General*, for the defendant in error, argued, among other things, that the proof as to the ownership of the car was sufficient. *State v. Parker*, 16 Nev. 79; *Huling*

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v. State, 17 Ohio St. 589; *Markham v. State*, 25 Ga. 52; *Houston v. State*, 38 id. 165; 2 Bish. Crim. Proc. sec. 1377. It was not necessary to allege that the offense was committed in the day time. *Comm. v. Reynolds*, 122 Mass. 456; *Butler v. People*, 4 Denio, 68; Bish. Crim. Proc. sec. 133. Where there are two grades of an offense, the greater having certain peculiar ingredients, the lesser negativing these peculiar features, the information need not aver the negative facts. *State v. Kane*, 63 Wis. 264.

CASSODAY, J. There is undisputed testimony on the part of the state to the effect that Saturday, July 25, 1885, the plaintiff in error was stopping at a hotel in Black River Falls, having his name registered as W. H. Eldredge, and a room assigned him opposite thereto. He had then been there about three days. In the afternoon of the day named he had a box or chest taken from the depot to his room, weighing about 150 pounds. No evidence was given as to what was in it. About three o'clock in the afternoon of the same day he arranged with the local express agent for the sending of a box to Chicago, then at the hotel, and represented by him as weighing about 225 pounds. By his prearrangement, the box was brought to the depot just in time for the 7:50 P. M. Chicago train, and was shipped in the express car thereon by the local agent, as directed. Soon after the starting of the train, there seems to have been a suspicion as to the contents of the box. This suspicion was increased as telegrams were received at different stations from Black River Falls respecting the box. Finally, being convinced by such dispatches that there was a man in the box, the train-men telegraphed forward to Elroy to secure the presence of an officer on the approach of the train to make the arrest. On reaching Elroy, in the night, this box in the express car was opened, and the plaintiff in error was found therein, with a revolver, billy, razor, knife, rope, gimlet, and

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a bottel of chloroform. There was also evidence tending to show that there were packages of money in the custody of the express agent on the car; that such agent had an assistant as far as Elroy; that from there to Chicago such car was usually in charge of only one man; that after the arrest, and when asked his object in being thus shipped in the box, the prisoner voluntarily admitted, in effect, that he had considered his chances carefully; that he went into the thing as a matter of speculation; that he needed money, and needed it quickly; that he expected to get fully $50,000; that had he passed out of Elroy he would have got off with the money; that, in a case of that kind, if a human life stood in his way, it did not amount to a snap of the finger.

The motion in arrest of judgment was based upon the dissimilarity in the language employed in the second count in the information, under which the plaintiff in error was convicted, and the statute under which he was prosecuted.

1. That statute provides, in effect, that "any person who shall *enter in the night time without breaking*, or shall *break and* enter in the day time any . . . railroad freight car, or passenger car, with intent to commit the crime of murder, rape, robbery, larceny, or other felony, shall be punished by imprisonment in the state prison not more than three years, nor less than one," etc. Sec. 4410, R. S. Under this statute, such entry with such intent in the *night time*, even without breaking, is sufficient to constitute such offense. *Rolland v. Comm.* 82 Pa. St. 325. But the allegation is that he "did break and enter with intent," etc. Had the allegation been that he "did *break and* enter in the night time," with such intent, then the case would have come under the preceding section. That would have been for an offense of a higher grade, and could only have been committed in the night time. Manifestly there was no intention of the pleader to prosecute under that section. His evident purpose was to charge the offense prescribed in the

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section quoted. That could be done by charging that it was committed in the night time without breaking. But if it occurred in the day time, then it was necessary to charge a breaking in order to bring the case within the section. If it occurred at all it necessarily occurred either in the night time or in the day time. To charge that the offense was committed in the day time would only have been another way of charging negatively that it was not committed in the night time, so as to prevent its coming under the preceding section, which prescribed the higher offense. But such negative allegation would have been unnecessary. *State v. Kane*, 63 Wis. 260. Since the count in question charges the breaking as well as the entry, and fails to charge that it was in the night time, it does, in effect, charge that he did break and enter in the day time. *Comm. v. Reynolds*, 122 Mass. 454; *Butler v. People*, 4 Denio, 68. "For this purpose," said Blackstone, "anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be that if there be daylight or *crepusculum* enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moonlight." 4 Bl. Comm. 224. Under this definition, we must conclude from the proof that the entry was in the day time.

2. The question recurs whether the proofs show that there was a breaking in fact, within the meaning of the statute. Certainly not in the sense of picking a lock, or opening it with a key, or lifting a latch, or severing or mutilating the door, or doing violence to any portion of the car. On the contrary, the box was placed in the express car with the knowledge, and even by the assistance, of those in charge of the car. But it was not a passenger car, and the plaintiff in error was in no sense a passenger. The railroad company was a common carrier of passengers as well as freight. But the express company was exclusively a common carrier

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of freight, that is to say, goods, wares and merchandise. As such carrier, it may have at times transported animals, birds, etc., but it may be safely assumed that it never knowingly undertook to transport men in packages or boxes for special delivery. True, the plaintiff in error contracted with the local express agent for the carriage and delivery of such box, but neither he nor any one connected with the express car or the train had any knowledge or expectation of a man being concealed within it. On the contrary, they each and all had the right to assume that the box contained nothing but inanimate substance,—goods, wares, or merchandise of some description. The plaintiff in error knew that he had no right to enter the express car at all without the consent of those in charge. The evidence was sufficient to justify the conclusion that he unlawfully gained an entrance without the knowledge or consent of those in charge of the car, by false pretenses, fraud, gross imposition, and circumvention, with intent to commit the crime of robbery or larceny, and, in doing so, if necessary, the crime of murder. This would seem to have been sufficient to constitute a constructive breaking at common law, as defined by Blackstone, thus: "To come down a chimney is held a burglarious entry; for that is as much closed as the nature of things will permit. So, also, to knock at the door, and, upon opening it, to rush in with a felonious intent; or, under pretense of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house. All these entries have been adjudged burglarious, though there was no actual breaking, for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. And so, if a servant opens and enters his master's chamber door with a felonious design; or if any other person, lodging in the same house or in a public inn, opens and enters another's

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door with such evil intent, it is burglary. Nay, if the servant conspires with a robber and lets him into the house by night, this is burglary in both; for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt." 4 Bl. Comm. 226, 227.

So it has frequently been held in this country that, "to obtain admission to a dwelling-house at night, with the intent to commit a felony, by means of artifice or fraud or upon a pretense of business or social intercourse, is a constructive breaking, and will sustain an indictment charging a burglary by breaking and entering." *Johnston v. Comm.* 85 Pa. St. 54, and 82 Pa. St. 306; *State v. Wilson*, 1 N. J. Law, 439, 1 Am. Dec. 216; *State v. McCall*, 4 Ala. 643, 39 Am. Dec. 314; Bish. Stat. Crimes, § 312, and cases there cited. The same was held in Ohio under a statute against "forcible" breaking and entering. *Ducher v. State*, 18 Ohio, 308. But it is claimed that in this state the common-law doctrine of constructive breaking has no application to a case of this kind, and in fact is superseded by statute, except in so far as it is re-affirmed. Thus: "*Any unlawful entry of* a dwelling-house or other building with intent to commit a felony, shall *be deemed* a breaking and entering of such dwelling-house or other building, within the meaning of the last four sections." Sec. 4411, R. S. This section merely establishes a rule of evidence whereby the scope of constructive breaking is enlarged so as to take in "*any* unlawful entry of a dwelling-house or other building with intent to commit a felony." See *State v. Kane*, 63 Wis. 262. It in no way narrows the scope of constructive breaking, as understood at common law, but merely enlarges it in the particulars named. In all other respects such constructive breaking signifies the same as at common law. It necessarily follows that as the word "break," used in sec. 4410, had obtained a fixed and definite meaning at

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common law when applied to a dwelling-house proper or other buildings within the curtilage, the legislature must be presumed to have used it in the same sense when therein applied to other statutory breakings. *Ex parte Vincent*, 26 Ala. 145, 62 Am. Dec. 714; Bish. Stat. Crimes, §§ 7, 88; *Ducher v. State, supra.* That is to say, they must be deemed to have used the word as understood at common law in relation to the same or a like subject matter. We must hold the evidence sufficient to support the charge of breaking.

3. It is said that the second count does not charge the offense to have been committed in any place prohibited by law; "that the freight and express car of the American Express Company" mentioned therein does not describe a "railroad freight car or passenger car," mentioned in sec. 4410, R. S. One of the definitions of a car given by Webster is: "A carriage for running on the rails of a railway," illustrated by the picture of a "railway car," with these two words beneath it. Every "express car" must be a "freight car," and, to make it certain, the charge is, "the freight *and* express car;" but it does not follow that every "railroad freight car" is an "express car." Both courts and juries may take judicial notice of what everybody knows respecting the common incidents of railway and express carriage. *Downey v. Hendrie*, 46 Mich. 498; *Queen v. Ruscoe*, 8 Adol. & E. 386. Among these is the fact that an express car is a railroad car. We think the information sufficiently definite in this regard, especially after verdict. *Queen v. Stroulger*, L. R. 17 Q. B. Div. 327.

4. It is said that there was no proof that the car mentioned was the property of the American Express Company. But the question was collateral, or at least incidental, to the real issue involved, and absolute proof of ownership was not essential. The proof of the exclusive possession, occupancy, and control of the car by the express company, therefore, was sufficient proof of ownership. *Ducher v.*

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State, 18 Ohio, 315, 316; *Huling v. State*, 17 Ohio St. 583; *State v. Parker*, 16 Nev. 79; *Markham v. State*, 25 Ga. 52. Especially is this so under our statute. Sec. 4621, R. S. Otherwise it might be at times very difficult, if not impossible, to convict, when the offense was committed in the freight car of a distant company, notwithstanding all the essential facts constituting the offense might be readily established. It is not like an entire failure of proof of title of real estate, as in *Jackson v. State*, 55 Wis. 589. The jury were not bound to find beyond a reasonable doubt the ownership of such car, or whether it belonged to the express company or the railway company, and the instructions asked to the contrary were properly refused.

5. During the argument of the case the district attorney animadverted to the jury upon the fact that the prisoner had not been sworn, to which his counsel objected; whereupon the court ruled: "It is probably competent to show that the offense has not been denied." The language of the district attorney is not preserved in the bill of exceptions. It merely appears that he animadverted upon the fact of his not being sworn; and the court thereupon, in effect, indicated that he was at liberty to argue to the jury that the offense had not been denied. It was a fact necessarily known to the jury that the prisoner had not been sworn. The undisputed evidence included the prisoner's voluntary admissions of guilt. Under such circumstances, and in the absence of just what was said by the district attorney, and the occasion of it, we must presume that something occurred or was said which rendered such remark proper. *Williams v. State*, 61 Wis. 290; *Hoffmann v. State*, 65 Wis. 46; *Hinton v. Cream City R. Co.* 65 Wis. 331-333; *Gallinger v. Lake Shore Traffic Co.* 67 Wis. 529.

Other exceptions are sufficiently considered in what has already been said.

By the Court.— The judgment of the circuit court is affirmed.

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MUTH, Respondent, vs. FROST, Appellant.

March 2 — March 22, 1887.

Court and jury: Contributory negligence.

1. In an action for the contract price for putting on a tin roof (which was blown off shortly after it was put on), it is *held* that the evidence conclusively shows that the roof was not properly put on and fastened, and that it was error to submit that question to the jury.
2. One who has placed his machinery in a building, with knowledge of the leaky condition of the roof, is guilty of contributory negligence which will prevent a recovery for the damage to such machinery caused by the leakage.

APPEAL from the Circuit Court for *Sheboygan* County.

In 1882 the parties entered into a contract, in and by which the plaintiff agreed to place upon a certain large building which the defendant was erecting in the city of Sheboygan for manufacturing purposes, a tin roof with standing seams, at a stipulated price per square; the defendant to furnish the materials therefor. The roof was to be as good as could be made in that city, or, as the court construed the contract, "the plaintiff was to place upon the defendant's factory a good, suitable, and fit roof for the purposes for which it was to be constructed and the place where it was to be used."

The defendant furnished the materials and the plaintiff put on the roof, completing the work about the middle of November. On December 4th of the same year a large section of the roof was carried away by the wind and three days later another large section was blown off. These were high winds, but not unusually so for the season. The plaintiff repaired the roof, completing his work thereon in April; but the roof leaked badly thereafter, until the defendant replaced it with a new one in the following autumn or winter.

This action is to recover the contract price for putting on

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the roof, and for the labor and materials furnished by the plaintiff in making such repairs; also for constructing gutters, concerning which there seems to be little or no controversy. The defendant answered, alleging the failure of the plaintiff to perform his said contract, and also pleaded counterclaims for damages for the loss of the materials furnished by him in the first instance, and for injuries to his machinery caused by the leaky condition of the roof.

The testimony and rulings of the court on the trial are sufficiently stated in the opinion. The jury found for the plaintiff, and assessed his damages at the full amount of his claim. A motion by defendant for a new trial was denied, and judgment was thereupon entered for the plaintiff pursuant to the verdict, from which the defendant appeals.

For the appellant there was a brief by *Seaman & Williams*, and oral argument by *Mr. Seaman.*

Felix Benfey, attorney, and *A. C. Prescott*, of counsel, for the respondent.

LYON, J. 1. The testimony is conclusive that the safe and proper mode of fastening down and securing the tin covering of a roof like that in question is to place cleats upon it, as near as possible to the standing seams, and nail the same to the roof-boards. These cleats should be two inches wide, should be placed at intervals of not more than twelve to fourteen inches, and each should be nailed with two nails. There is no appliance other than the cleats to hold the tin roofing in place. The testimony is also conclusive that the tin put by plaintiff upon the defendant's roof was not secured in that manner; but that in some places the cleats were placed some twenty-eight inches apart, and even a greater distance, and that many of them were fastened with but one nail. That these defects in construction were elements of weakness and rendered the tin roofing more liable to be carried away in a high wind than

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it would have been were it properly put on, is unquestionable. It is quite immaterial that very many of the cleats, perhaps a majority of them, were placed the proper distance from each other and properly nailed to the roof-boards. As the weakest link in a chain is the true measure of the strength of the chain, so the defective portions of this roof give the true measure of the sufficiency of the whole roof. It does not require an expert to know that, if the tin is so defectively fastened to the roof boards in any place that the wind can get a purchase under it and raise it, the whole roofing is thereby endangered, and may be swept away, although other portions of it are properly constructed.

Some attempt was made to show that openings were left in the building through which the wind entered and lifted the tin. But it is undisputed that the roof-boards were seven-eighths of an inch thick, planed on both sides, and matched closely together. It does not appear that there were any holes left in it. Of course, there was no chance for the wind to get any considerable purchase under the tin roofing through the roof-boards, and it is manifest that had the tin been properly laid it would have suffered no injury. Moreover, there is a strong preponderance of evidence tending to show that no openings were left in the building.

By assessing the plaintiff's damages at the full amount of his claim, the jury must have found that the tin roofing was properly laid in the first instance. Under the evidence contained in this record, the question whether the roofing was properly laid should not have been submitted to the jury. The verdict in that behalf is not sustained by the proofs, and for that reason a new trial should have been ordered.

2. After the roofing was blown off, the defendant's agent took some part in the attempt to repair the roof. It is claimed that the leaky condition of the roof after such repairs were made, resulted from the acts of such agent, and that the plaintiff is not chargeable therewith. If the roof

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would have been sufficient after it was repaired by the plaintiff but for the acts of such agent, the plaintiff is entitled to recover the original contract price therefor, but not for the repairs. This is so because he failed to perform his contract in the first instance and because of such default the repairs were made necessary to a full performance of his contract. If another trial should develop the fact that the roofing was properly laid by the plaintiff in the first instance, then he should recover the contract price therefor, and, in addition thereto, the value of his labor and materials in making the repairs, subject to deduction for any failure to make such repairs in a proper and workmanlike manner.

3. If the roof was worthless because of the default of plaintiff in the performance of his contract, and the materials furnished by defendant therefor became thereby of no value or less value, the defendant should be allowed the amount of his loss in that behalf. But we do not perceive how defendant can properly be allowed for damage to machinery caused by the leaky condition of the roof. The leakage developed from the first, and it was his own folly if he placed machinery where it would be injured thereby.

By the Court.—The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

COLLETTE, Respondent, vs. WEED and another, Appellants.

March 2 — March 22, 1887.

(1) Sale of chattels: Warranty: Parol evidence: Consideration. (2, 3) Pleading: Abatement of action prematurely brought.

1. Although a bill of sale does not contain a warranty, it may be shown by parol that there was an oral warranty of quantity; and a written guaranty of quantity executed a day or two later than the bill

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of sale, in pursuance of an oral agreement made at the time of the sale, is based upon a sufficient consideration and is a binding part of the contract.

2. The fact that an action is prematurely brought should be pleaded in abatement.

3. Where all of a lot of logs should have been scaled before an action was brought for the shortage, and the plaintiff had caused all that he was able to find to be so scaled, the fact that a few more were discovered after the commencement of the action should not defeat the action, especially where that fact was pleaded not by way of abatement but as a defense on the merits.

APPEAL from the Circuit Court for *Manitowoc* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This action was brought to recover for an alleged shortage on a sale of logs made by the defendants to the plaintiff. The contract of sale upon which the action was founded was in writing, and the following are copies of the bill of sale and guaranty on which the action is founded:

"Know all men by these presents, that *A. Weed & Co.*, of the village of West Depere, in the county of Brown and state of Wisconsin, of the first part, for and in consideration of the sum of fifteen ($15,205.50) thousand and two hundred and five and fifty 50–100 lawful money of the United States to us in hand paid by *Henry Collette*, of the village of West Depere, in the county of Brown and state aforesaid, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his heirs, executors, administrators, and assigns, the following described goods, chattels, and personal property, to wit, one million nine hundred and sixty-two thousand (1,962,000) feet of pine saw-logs, together with two set of booms of twenty-three sticks each, with coupling and cross-chains complete, and one set with coupling chains, which are now lying in the Peshtigo river, at the harbor, and one million

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above Peshtigo village, in Marinette county, Wisconsin, and marked with the letter 'V' stamped on the end of log, and for side mark ⁊, to have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, forever; and we do, for ourselves, our heirs, executors, and administrators, covenant and agree to and with the said party of the second part, his executors, administrators, and assigns, to warrant and defend the sale of said goods, chattels, and personal property hereby made unto the said party of the second part, his executors, administrators, and assigns, against all and every person and persons whatsoever.

"In witness whereof we have hereunto set our hands and seals this 2d day of December, A. D. 1881.

"A. WEED & Co. [Seal.]

"Signed, sealed, and delivered in the presence of J. H. SCOTT."

"Memorandum of agreement made and entered into this 2d day of December, 1881, by and between *Henry Collette*, of one part, and *A. Weed & Co.*, of the other part: Witnesseth, that the said *A. Weed & Co.* have this day sold to the said *Collette*, among other things, a quantity of saw-logs lying in the Peshtigo river, Marinette county, Wisconsin, estimated at 1,962,000 feet, with side mark ⁊, and end mark V, and the said *Collette* has agreed to pay therefor the sum of $7.75 per thousand feet, and in notes and cash has paid them a considerable portion thereof. But it is agreed by the said parties that the said *Collette* shall retain the sum of $1,205.50 until all of said logs have been rafted and scaled; and, if it shall then be found that said logs shall hold out in quantity to the said estimate, the said *Collette* shall pay said *A. Weed & Co.* the sum last aforesaid; but, if said logs shall not hold out, then in that case the said *Collette* shall retain of said sum at the rate of $7.75 per thousand feet shortage, and pay only the balance, if any. The scale shall be ac-

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cording to the rule and practice of the Peshtigo Co. in the purchase of logs. In case the shortage, if any, shall exceed in amount the sum of $1,205.50, as aforesaid, then in that case the said *Collette* shall have a claim against *A. Weed & Co.* for such excess.

"J. H. SCOTT. H. COLLETTE.
"M. HUBBARD. A. WEED & Co."

Upon the trial the evidence showed that the guaranty contract was not reduced to writing and signed by the parties until a day or two after the bill of sale was executed and delivered, It is upon this fact that the learned counsel for the defendants rely to defeat the plaintiff's recovering for the alleged shortage. This is the main point made by the defendants. They also insist that, if the plaintiff was entitled to recover at all for the shortage, he should have recovered only for the value of 375,921 feet.

The case was referred to a referee to hear, try, and determine. The referee found the following, among other facts:

"*Fourth.* That as part of the same transaction with said contract of sale, and in consideration thereof, the plaintiff and the defendants entered into a written agreement wherein and whereby the defendants guarantied that the said logs contained the number of feet above stated, which written agreement is on file herein, and is marked Exhibit 2.

"*Fifth.* That the terms and conditions of said written contract of guaranty were agreed upon by and between the parties thereto at the time of the making of said contract of sale, and in consideration thereof, although the same was not executed at said time, but within a few days thereafter."

"*Eighth.* That the logs mentioned in said bill of sale and contract did not amount to 1,962,000 feet, but to 1,166,620 feet, and no more, as duly determined by a scale of the same thereafter made as contemplated by said agreement.

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"*Ninth.* That plaintiff has received said 1,166,620 feet of logs by virtue of said contract of sale as follows:

(1) During the year 1882, scale at mill according to method prescribed in contract	988,066
(2) 146 logs lost in transit after delivery to tug-boat employed by plaintiff to tow same to his mill, estimated	24,333
(3) Taken from river in 1883, Peshtigo Co.'s scale	124,121
(4) Taken from river in 1884, Peshtigo Co.'s scale	10,100
(5) Logs still in river, estimated	20,000
Total quantity received	1,166,620 feet.

"*Tenth.* That the difference between the quantity of logs guarantied to be conveyed by said bill of sale and the accompanying agreement, and the quantity actually so conveyed, is 795,380 ft.

"*Eleventh.* That the value of said shortage, at $7.75 per thousand, is $6,164.19."

These findings were duly excepted to by the defendants. The exceptions were overruled by the circuit judge at the hearing upon the report of the referee, and judgment was directed to be entered in favor of the plaintiff for the amount found due to him by the referee. The defendants duly excepted to the order of the circuit court affirming the report of the referee and directing judgment in accordance therewith.

The defendants appealed from the judgment.

For the appellants the cause was submitted on the brief of *Weisbrod, Harshaw & Nevitt.*

For the respondent there was a brief by *Vroman & Sale,* and oral argument by *Mr. Vroman.* They contended, *inter alia,* that the defense of premature action is in abatement and not in bar. *Archibald v. Argall,* 53 Ill. 307; *Palmer v. Gardiner,* 77 id. 143; *Carter v. Turner,* 2 Head, 52; *Clements v. Swain,* 2 N. H. 475. The defendants not having interposed this defense by way of special plea in abatement

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waived it. *Sanford v. McCreedy*, 28 Wis. 106; *Smith v. Peckham*, 39 id. 418; *Johnston v. Wilson*, 2 N. H. 202; *Dutcher v. Dutcher*, 39 Wis. 660; *Plath v. Braunsdorff*, 40 id. 107; *Johannes v. Youngs*, 48 id. 101. The quantity of logs not scaled as per agreement when the action was commenced is too insignificant to abate the action, even if a plea in abatement had been interposed. 2 Parsons on Cont. 656; *Cabot v. Winsor*, 1 Allen, 546; *Chambers v. Jaynes*, 4 Pa. St. 39; *Rees v. Smith*, 1 Ohio, 52.

TAYLOR, J. It is claimed by the learned counsel for the appellants that on the day of the date of the bill of sale the contract of sale between the plaintiff and the appellants was completed, and that upon such sale there was no guaranty as to the quantity of logs sold; that they were sold as an entire lot, after the respondent had examined for himself; and that he took the risk as to the quantity in the lot of logs purchased. On the other hand, the respondent claims that he bought the logs without any knowledge as to the quantity in the lot; that he depended wholly upon the appellants' representations as to quantity, and upon an agreement on their part to guaranty the quantity by a written contract thereafter to be executed by them, and that, a few days after the delivery of the bill of sale, the appellants executed the written guaranty in pursuance of such agreement made at the time of sale.

That the written guaranty was executed by the appellants a few days after the bill of sale was executed, is not denied by the appellants, but they seek to avoid its effect by an allegation that there was no consideration to uphold it. It is said the case comes within the decisions of this court in *Congar v. Chamberlain*, 14 Wis. 258, 264, and *Morehouse v. Comstock*, 42 Wis. 626, 629, where it is held "that it is a general rule that a warranty must be made at the

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time of the sale and be one of the terms of the contract, and that if it is made after the sale is complete or the contract performed, it will not be binding for want of a consideration. Chit. Cont. 397. But this is true only when there is no other consideration than the sale to support it." The difficulty of applying this rule to the case at bar is that the court and referee both find from the evidence that it was a part of the contract of sale that the vendors should and did guaranty the quantity of logs sold, and that the written guaranty was simply carrying out the terms of the sale, and so the purchase of the logs by the respondent was a sufficient consideration for the guaranty; that the guaranty was in fact a part of the terms of the original contract, and that the writing simply expressed what before existed in parol.

It is said that the findings of the referee upon this point are not sustained by the evidence. We think otherwise. It appears to us that the great weight of the evidence is in favor of the findings. The appellants having signed the guaranty in writing shortly after the delivery of the bill of sale, in which they impliedly admit that the sale was made upon the terms mentioned in said written guaranty, shows a sufficient consideration for the making of such guaranty, and is almost conclusive evidence that they had agreed to give such guaranty at the time the bill of sale was delivered. The finding of the referee is amply supported by the evidence on this question. That it is permissible to show by parol evidence that the vendor warranted the quantity of logs sold, notwithstanding the giving of the written bill of sale in which there is no such warranty made, is well supported by authority. Such evidence does not vary or contradict the terms of the bill of sale. See 2 Benj. Sales, § 943, note 14 (Am. notes by Charles Corbin); *Boothby v. Scales*, 27 Wis. 626; *Merriam v. Field*, 24 Wis. 640; *Cas-*

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sidy v. Begoden, 38 N. Y. Super. Ct. 180; *Bennett v. Tregent*, 24 U. C. C. P. 565; *Schuyler v. Russ*, 2 Caines, 202; *Boorman v. Jenkins*, 12 Wend. 566; *Hargous v. Stone*, 5 N. Y. 73. If there had been no contract between the parties except the original written contract of sale, it is not clear that the plaintiff might not have recovered in this action upon an implied warranty that the quantity of logs sold was in fact the amount stated in such bill of sale. See *Tarbell v. Bowman*, 103 Mass. 343; *Pickman v. Trinity Church*, 123 Mass. 1; *Mendenhall v. Steckel*, 47 Md. 453; *Marbury v. Stonestreet*, 1 Md. 152; *Hill v. Buckley*, 17 Ves. 401; *Stebbins v. Eddy*, 4 Mason, 417. But as the evidence clearly tends to prove, and the court has found, that there was an express verbal contract to warrant the quantity, and such contract was in fact reduced to writing in pursuance of such verbal contract, it is unnecessary to determine what the rights of the parties would have been under the bill of sale standing alone.

Upon the question as to the quantity of logs for which the plaintiff was entitled to recover under the agreement to make good the shortage, there was some conflict of evidence, but on the whole evidence the finding of the referee upon that question is fully sustained, and there is no sufficient reason for setting aside such finding.

It is also urged that the action was prematurely brought; that all the logs had not been scaled before the action was commenced. This was not set up by the answer, and is probably not available to the appellants. We think the evidence shows that the plaintiff had caused all the logs he was able to find to be scaled before he commenced his action, and the fact that a few were discovered afterwards should not defeat his action, especially as that defense was not interposed by way of abatement to the action, but as a defense on the merits. The court, in fixing the amount of the shortage, has allowed the appellants the quantity dis-

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covered since the action was commenced, so that they are not injured by the fact that they were not discovered and scaled before the action was commenced.

By the Court.— The judgment of the circuit court is affirmed.

WASHBURN, Appellant, vs. DOSCH and another, Respondents.

March 3 — March 22, 1887.

(1) Pleading: Counterclaim: Defense. (2) Contracts: Restraint of trade. (3) Statute of frauds.

1. Where matter properly pleadable as a defense — but not pleadable as a counterclaim because not constituting a cause of action in favor of *both* defendants — has been pleaded as a counterclaim, and a verdict has been rendered thereon for damages in favor of the defendants, the error may be cured by the trial court striking out such damages from the verdict and rendering judgment merely dismissing the complaint with costs.
2. An agreement, made upon the sale of a stock of goods, good-will, etc., that the vendor will not engage in the same business in that village for a period of five years, is valid, being only a partial or limited restraint upon trade.
3. A contract fully executed by one party at the time of the making thereof, is not within the statute of frauds, although by its terms it is not to be performed by the other party within one year.

APPEAL from the Circuit Court for *Richland* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

The complaint is upon a promissory note executed by the defendants, *Dosch* and *Noble*, jointly, February 12, 1883, payable to the plaintiff, for $528 and interest. The answer of the defendants alleged, in effect, that the note was signed by *Noble* merely as surety for *Dosch*, to the knowledge of the plaintiff; that the note was given by *Dosch* at the time named in part payment of the purchase price

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of a stock of dry goods, groceries, furniture, and fixtures, invoiced at $6,380.80, then owned by the plaintiff and in his store building in the village of Excelsior, and in which he had for years carried on a successful and lucrative business as a dry-goods and grocery merchant; that, upon said purchase then made, the said *Dosch* agreed to pay to the said plaintiff for said dry goods, groceries, furniture, and fixtures, together with the good-will of said business, and upon the agreement of the plaintiff that he would refrain from doing any such business in said village or vicinity for the period of five years (for which period *Dosch* then leased said store of the plaintiff at $366 per year), the said sum of $6,380.80, and thereupon said *Dosch* entered into and took possession of said property and continued said business; that, in violation of said agreement, the plaintiff re-established the same kind of business, and continued to sell in said village the same class of dry goods and groceries at retail, to the damage of *Dosch* in the sum of $2,000; and, for a second counterclaim, that the plaintiff was indebted to *Dosch* for or on account of railroad ties in the sum of $100; that *Dosch* had fully performed said agreement on his part, and that the plaintiff had failed to perform. The answer demanded the dismissal of the complaint with costs, and that the amount of the plaintiff's claim be set off against the claim of *Dosch*, and for judgment. To each of the counterclaims the plaintiff replied by general denial.

At the close of the trial, the jury returned answers to four several questions submitted to them, to the effect (1) that the value of the 100 railroad ties, for which demand was made in the second counterclaim, was $27.50; (2) that such railroad ties were not paid or settled for at the time of settlement between the plaintiff and *Dosch* in April, 1884; (3) that the plaintiff agreed with *Dosch*, when he sold him his stock of goods in February, 1883, that, in consideration of *Dosch* buying the stock, he would not

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enter into the dry-goods and grocery trade in Excelsior for a period of five years; (4) that the damages which directly resulted to *Dosch* from the plaintiff again going into the dry-goods and grocery trade in Excelsior were $550. The jury at the same time returned a general verdict as follows: "We, the jury, impaneled and sworn to try the above-entitled action, find for the defendants ($16.57) sixteen dollars and 57-100;" which last words and figures, to wit, "($16.57) sixteen dollars and 57-100," the court directed to be stricken from the verdict, and the same were stricken therefrom. The plaintiff moved the court upon the minutes to set aside said verdict and findings, and for a new trial, which was denied. Thereupon judgment was rendered upon said verdict and findings, dismissing the complaint upon the merits and for costs. From the judgment so rendered the plaintiff appeals.

John D. Wilson, for the appellant.

For the respondents there was a brief by *Brooks & Dutcher*, and oral argument by *Mr. Brooks*.

CASSODAY, J. The plaintiff objected to any evidence in support of the first counterclaim, on the ground that the matter therein alleged was not properly pleadable as a counterclaim. The reason for the objection is that such counterclaim did not exist in favor of both defendants and against the plaintiff, so that a several judgment might have been had thereon in the action, as required by sec. 2656, R. S. But it was for a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or, at least, it was connected with the subject of the action. In this respect it satisfied subd. 1 of that section. Assuming that it did not strictly satisfy all the requirements of a counterclaim, still it was properly pleadable by both defendants as "a statement of new matter constituting a defense." Subd. 2, sec.

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2655, R. S. As such mere defense no reply was necessary, as it was to be deemed controverted without. Sec. 2667, R. S. Although it was pleaded as a counterclaim and replied to as such, yet the amendment of the verdict by the court striking out the excess found in favor of the defendants and giving judgment dismissing the complaint and for costs only, resulted in limiting the effect of the answer to a mere defense. The amendment was favorable to the plaintiff, and affected none of his substantial rights, and was properly deemed immaterial and amendable by the court. Secs. 2669, 2670, 2829, R. S.

The good-will of an established and successful business is undoubtedly of much value to the possessor of such business, and may be sold with it. *Wallingford v. Burr*, 17 Neb. 137, and cases there cited. But while such sale will entitle the purchaser to a certain limited protection, it will not of itself alone be sufficient to preclude the seller from engaging in a separate and independent business of the same kind in the same village or city. *Pearson v. Pearson*, L. R. 27 Ch. Div. 145, overruling *Labouchere v. Dawson*, L. R. 13 Eq. 322, in so far as it held that such seller so engaged must not solicit the customers of the old business to give their custom to himself. See, also, *Cottrell v. Babcock P. P. M. Co.* 54 Conn. 122; *Bergamini v. Bastian*, 48 Am. Rep. 216. In order to preclude the seller from engaging in such separate and independent business, there must be an agreement to that effect based upon a good and valuable consideration and not contrary to law or public policy.

The evidence seems to be sufficient to support the finding that, as a part of the contract of sale, the plaintiff agreed with *Dosch* not to again engage in the dry-goods and grocery trade in the village for a period of five years. The evidence is undisputed that he broke such agreement, if he ever made it. Manifestly, the purchase was made with the expectation of both parties that *Dosch* would continue the

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same business for the period of at least five years, in the same village and in the same building; for he not only purchased the goods, furniture, and fixtures therein, but took from the plaintiff a contemporaneous lease of the building for the period named. There was evidence tending to prove that, as an inducement to *Dosch* to make the sale, the plaintiff spoke of the good-will of the business and placed a high estimate upon its value. That value consisted largely in the probability of the plaintiff's former customers thereafter giving their trade to *Dosch* at the same store. Of course, that probability would be very much strengthened, and such value correspondingly increased, by including in the contract of sale a binding agreement upon the part of the plaintiff to abstain thereafter from engaging in the same business in the same village. In the language of BRETT, M. R., "such a contract added an indelible feature to the business, and increased the value of the good-will." *Jacoby v. Whitmore*, 49 Law T. (N. S.) 337, 28 Alb. L. J. 510. This being so, such an agreement would necessarily be a very substantial inducement to the purchaser to make such purchase, and to pay or agree to pay the price named. These things being so, we think the jury were warranted in finding that the plaintiff made such agreement in consideration of the purchase.

That agreement was in no sense an absolute restraint upon trade. The plaintiff was still at liberty to engage in any and every other kind of business in the same village. He was, moreover, still at liberty to engage in the same business in any other village or city in this or any other state. The agreement, therefore, was only for a partial or limited restraint upon the plaintiff as a tradesman, and not upon trade generally. *Kellogg v. Larkin*, 3 Pin. 141, 56 Am. Dec. 172. Such restraining of one person from doing a particular class of business in a particular place, left the field of competition free and open to everybody else. It

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merely took from one individual the right to resume the beneficial use of what he had himself already disposed of for value to another. The enforcement of such an agreement is not contrary to public policy. *Dwight v. Hamilton*, 113 Mass. 175; *Burrill v. Daggett*, 77 Me. 545; *Fairbank v. Leary*, 40 Wis. 637. Such restriction did not extend beyond what was necessary for the protection of *Dosch* in the enjoyment of the trade, business, and good-will which he so purchased from the plaintiff, and, under the authorities, it was reasonable, and hence permissible. *Dunlop v. Gregory*, 10 N. Y. 241; *Doutelle v. Smith*, 116 Mass. 111. "The restriction which it imposes," said GRAY, C. J., in the case last cited, "is confined to a particular place, and is but co-extensive with the interests purchased." We must hold that the contract was based upon a good consideration, and not void as being against public policy.

Was the agreement void because it rested in parol and by its terms was not to be performed within one year from the making thereof? Subd. 1, sec. 2307, R. S. Upon this question courts are divided. Several years ago, and after mature deliberation, this court concluded to follow the rule sanctioned in England and several of our sister states, instead of the one adopted in New York and some of the New England states. *McClellan v. Sanford*, 26 Wis. 609. The cases are there classified. See, also, *Jilson v. Gilbert*, 26 Wis. 637; *Treat v. Hiles*, *ante*, p. 344. The rule thus sanctioned by this court is to the effect that, although the agreement by its terms is not to be performed by one of the parties thereto within one year from the making thereof, yet, if it is based upon a good and valuable consideration received by such party and executed by the other party at or before the time of the making of such contract, then the case is thereby taken out of the statute, and may be enforced. To use the language of DIXON, C. J., in the leading case cited, the statute "applies only to contracts not to

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be performed on *either* side within the year." The rule thus sanctioned by this court was recently applied in Iowa to a case where the agreement was to refrain from doing a particular kind of business in a particular place. *Smalley v. Greene*, 52 Iowa, 241. It follows that the contract was binding upon the plaintiff.

We find no error in the rulings of the court upon matters of evidence, nor in giving instructions to the jury. The exceptions in these regards are sufficiently covered by what has already been said.

By the Court.—The judgment of the circuit court is affirmed.

See notes to this case in 32 N. W. Rep. 551, 552.—REP.

FIRST NATIONAL BANK OF DUBUQUE, Appellant, vs. BAKER, Garnishee, etc., Respondent.

March 3 — March 22, 1887.

VOLUNTARY ASSIGNMENT. *(1) Preference of claims for wages, etc.: Repeal by implication. (2) Partnership: Exemptions. (3, 4) Fraud: Evidence: Acts of assignor: Preference of debt to assignee. (5) Place of assignment: Domicile.*

1. Ch. 48, Laws of 1885, which directs an assignee to pay first the claims of servants, etc., for personal service performed within three months prior to the assignment, does not repeal by implication ch. 349, Laws of 1883, which authorizes preferences in the assignment for wages earned within six months prior thereto.
2. An assignment by partners purported to convey to the assignee all the partnership property "not exempt to them by the laws of the state," and a schedule contained a claim by each partner of certain property as being exempt. All of the property, however, was delivered to the assignee and remained in his possession, and the assignors never in fact claimed any property as exempt. *Held*, that the exemption clause did not invalidate the assignment.

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3. The fact that after the execution of an assignment the assignor, in pursuance of a prior contract, gave to one of his creditors an order upon one of his debtors, which was paid, did not invalidate the assignment.
4. The fact that, before the assignee knew that an assignment was contemplated, the assignor turned over to him notes of the value of $215, in discharge of a debt of $90 due him, and upon his agreement to pay $100 to an employee of the assignor, there being nothing to show that the transaction was not in good faith, is *held* not to invalidate the assignment subsequently made.
5. One partner had never resided in this state. The other partner had resided in Crawford county (where the firm had its only place of business) for six or seven years prior to the assignment. Some months prior to the assignment the wife of the latter partner left the state because of sickness, and her husband thereupon broke up housekeeping and sold some of his furniture, but remained in Crawford county attending to the business until about the time of the assignment. *Held*, that the assignment was properly made in Crawford county.

APPEAL from the Circuit Court for *Crawford* County.

The action was commenced against J. L. Nowlin and W. H. Robison, who constituted the firm of J. L. Nowlin & Co.; and *C. W. Baker* was summoned as garnishee. The garnishee answered, denying all liability as such, and justifying his possession of certain property of defendants under and by virtue of an assignment thereof to him for the benefit of their creditors. The answer of the garnishee further alleged that certain railroad ties in his possession, of the value of $400, were exempt from execution as the stock in trade of the said defendants. Issue was taken upon the answer of the garnishee, and upon the trial the court held the assignment valid and directed the jury to find a verdict in favor of the garnishee. From the judgment entered upon such verdict the plaintiff appealed. Other facts are stated in the opinion.

C. S. Fuller, for the appellant.

John D. Wilson, for the respondent, argued, among other things, that the exemption clause was inoperative because

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the firm as such had no exemptions, and, the assignors never having claimed the property, the assignment was not invalidated thereby. *Goll v. Hubbell*, 61 Wis. 293; *First Nat. Bank v. Hackett*, id. 335; *Bates v. Simmons*, 62 id. 69; *McNair v. Rewey*, id. 167; *Zielke v. Morgan*, 50 id. 560. The acts of the assignors subsequent to the assignment could not invalidate it. *Emerson v. Senter*, 118 U. S. 3; *Hammel v. Schuster*, 65 Wis. 669.

Cole, C. J. The garnishee claims the property in controversy as assignee under an assignment made by J. L. Nowlin & Co., bearing date August 3, 1885. It is insisted that this assignment is void for various reasons.

First, it is said it purports to give preferences to the claims of employees for wages earned within six months prior to the assignment, which is not permitted since the enactment of ch. 48, Laws of 1885. Ch. 349, Laws of 1883, expressly authorizes preferences for the wages of laborers and employees earned within six months prior to the making of such assignment; but it is said this provision was modified, or by implication repealed, by the subsequent statute. There is no necessary conflict between the two statutes, and they may well stand together. The law of 1883 allows preferences for the wages of laborers for six months to be given in the assignment itself; while the law of 1885 requires the assignee to first pay the claims of all servants, clerks, and laborers for personal services performed within three months prior to the assignment, whether these claims are preferred in the assignment or not. In other words, this law gives a general preference to this class of claims over all other debts owing by the assignor except those which are expressly mentioned. The latter statute does not profess to repeal the former, and if it does so it is by implication. But considering the scope and object of the two statutes there is no necessary conflict in their provisions.

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Another objection is that the exemption clause in the assignment renders it void. The assignment was made by the members of the firm of all the partnership property and effects of every kind for the benefit of creditors. In the preamble it is stated that all the property is assigned "not exempt to them by the laws of the state of Wisconsin, a schedule whereof is annexed of such exempt property." In the assignment proper there is no reference to any schedule whatever; but in the schedule containing a list of debts due laborers and employees is what purports to be a claim made and signed by each partner of a quantity of railroad ties as exempt as stock in trade out of the property assigned. But it is an undisputed fact that all the ties mentioned in this claim as being exempt were delivered to the assignee, and none of them have ever been in the possession of either of the members of the firm, nor is there any evidence that any of this property is claimed by them as exempt. Of course, an exemption in favor of a copartnership would be wholly inoperative (*Russell v. Lennon*, 39 Wis. 570; *First Nat. Bank v. Hackett*, 61 Wis. 335), and there is no pretense that the partners ever attempted to sever and set aside any ties as exempt, or even to claim them, but all the ties were delivered to the assignee and were held by him with the other assigned property until they were taken from his possession by the sheriff on the attachments. So, upon the facts, we think the exemption clause did not invalidate the assignment.

There were a number of facts and circumstances disclosed on the trial which it is claimed showed that the assignment was fraudulent as to creditors. The circuit court in effect held that the evidence was not sufficient to justify the jury in finding that the assignment was fraudulent, and directed a verdict for the defendant. It is insisted that the court erred in this ruling, and that there were several transactions which tended to prove an illegal and fraudulent preference of creditors which should invalidate the assignment, and

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that the case should have been submitted to the jury. The learned circuit judge gave an opinion which is so clear and satisfactory upon this branch of the case that we cannot do better than make some excerpts from it as expressing our views upon the objections taken to the assignment. The circuit judge says:

"The fraud which is suggested rests upon a few circumstances. First, it is said, and there is proof, that Nowlin, on the 25th day of June last, received $1,000 from Mr. Linderman at the Bank of Viroqua, and that upon July 28th he received $1,305.63 from the Bank of Viroqua, and it is suggested that some of this money was retained by him at the time the assignment was made, in fraud of the creditors of the firm of Nowlin & Co. The proof shows that out of the $1,000 received June 25th he paid between $800 and $900 to the miller for flour that the firm had bought, and paid it about the time the $1,000 was received, and that the balance of the money was applied in payment of the debts of the firm before the assignment. Mr. Nowlin has testified to certain specified amounts paid out by him from the $1,305.63 received, amounting, all told, to $781. He says that his memorandum of payments out of that fund,— which he has not with him because he had no notice that this subject was to be inquired into,— would show that all of that money, with the exception of $7 or $8 he himself retained, and $75 paid to his wife, was paid out in discharge of the indebtedness of the firm. There is no proof to controvert this statement by him. It would seem, therefore, that these two sums of money received by him from the Bank of Viroqua are satisfactorily accounted for. But even if, at the time of the assignment, he had in his pocket or under his control several hundred dollars of this fund, I do not think that that would invalidate this assignment. The legal title to such money would vest in the assignee, and he would be entitled to all the processes of the law applicable thereto to obtain it.

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"Again, it is said the assignment is invalid because after August 3d, when the papers were executed, Mr. Nowlin gave an order upon Ayer, of Chicago, for $169.32 to Mr. Vaughan, of Wauzeka, which money Mr. Vaughan obtained on such order. The proof shows that Nowlin & Co., as early as January last, had a contract with Ayer, who is an extensive tie buyer, to sell ties at a fixed sum,— ties of a good quality at forty-two cents; that Mr. Nowlin, before this assignment was made, had said to Mr. Vaughan that if he would put the ties that he had there at Wauzeka in such contract, he should receive for them the money that Ayer would pay him; that, before the assignment was made, the inspector of Ayer inspected the ties and they then became the property of Ayer; that Ayer then became indebted to Nowlin & Co. for the price of said ties at forty-two cents each; that, after the assignment was executed, Mr. Nowlin signed an order, in the name of the firm of Nowlin & Co., upon Ayer, and gave it to Mr. Vaughan, and that Mr. Vaughan received the $169.32. This proceeding seems to have been in good faith, but it may have been illegal. If it was, it does not invalidate the assignment that before that time had been made, although the payment to Mr. Vaughan of that sum of money due to Nowlin & Co. may make him responsible to the assignee for the sum, and it may be the duty of the assignee to demand and recover it of him.

"Another reason why it is said this assignment is invalid is that Nowlin & Co. owned a span of ponies, and that Mr. Nowlin drove these ponies out of the state before the assignment. Mr. Nowlin says that these ponies were in fact sold to his daughter some time last winter, but were retained by him until a short time before the assignment, when he took them over to Iowa, and delivered them to her. If his testimony is true,— and there is nothing to contradict it, and he certainly seemed a fair witness,— there is not a *scin-*

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tilla of fraud about this; but if it were not true, and the ponies actually belonged to Nowlin & Co. at the time they were taken out of the state, that would not invalidate this assignment. These ponies are not exempted from the operation of the assigment, and the assignment vested the title to them, as well as to all the other property of the company, in the assignee; and the assignee himself, or any creditor if the assignee himself fails to do it, may bring an action to recover the possession of those ponies.

"Again, it is said that there is a note of King of $97 that is not in the inventory. There is no direct proof before this court that any note of King's existed at the time this assignment was made. It is suggested that there is a memorandum somewhere in the books and papers that shows that there was such a note in July. The note is said to be for $97. The assignee says that he knows nothing about it. It is too well established for dispute that the omission of an item like this from the inventory will not invalidate the assignment.

"Again, it is said that this assignment is invalid because four notes were turned over to the assignee, prior to the time of the assignment, in discharge of a debt due by the firm to him, of the amount of $90, and upon an agreement that he would pay $100 to an employee of the firm named Lewis, to whom was due, all told, something over $160. The proof shows that before the assignment, and before *Mr. Baker* knew that an assignment was contemplated, Mr. Nowlin asked him to advance to Lewis, whom the firm owed, $100, and that if he would do so he would turn over to him four notes, then specified, of the value together of $215, in payment of his claim against the firm of $90, and for the $100 to be paid to Lewis; that Lewis came in, and assented to the arrangement, and agreed to take *Baker* for $100; that the notes were not delivered to *Mr. Baker* at the time the agreement was made, but were delivered to

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him by Mr. Nowlin in the city of Prairie du Chien upon the day the assignment was made. The proof shows that *Mr. Baker* has paid to Mr. Lewis the $100. There is nothing in the testimony to indicate that the purpose of this transaction, upon the part of Mr. Nowlin, was to cheat or defraud creditors, or to give an unlawful preference to *Mr. Baker*, and there is no proof that this proceeding was not wholly in good faith upon the part of *Mr. Baker*. It cannot be said that this transaction invalidates the assignment. The only possible effect that the proceeding can have adverse to either Nowlin or *Baker* is this: If *Mr. Baker* received these notes, knowing, or having good reason to believe, that Nowlin & Co. were insolvent, he would get no title to them, and can be compelled by this court, in the settlement of his account, to account for these notes and to take his percentage as a creditor if his claim be properly proved. In that event he would of course be subrogated to the rights of Lewis, who, as an employee, was entitled to the payment of the full sum due him for wages, and the proof shows that the amount he was to receive was $30 per month and his rent; and the sum total due him at the time *Baker* agreed to pay him was only about $160.

"The only other claim made why this assignment is invalid for matter extraneous is this: That Nowlin & Co. were not residents of the state of Wisconsin. It is undisputed that Robison never resided in this state, but has for many years resided in the city of Dubuque. The proof shows that, for six or seven years before the assignment, Mr. Nowlin was a resident of this county of Crawford, and for about four years of that time a resident of Soldiers' Grove. It is true, there is testimony to show that his wife left Soldiers' Grove about April or May last, and went to Viroqua, where she remained a month, and subsequently went to Dubuque to be with her daughter who resided there. The proof shows that the family of Mr. Nowlin

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are grown and all married, and that it was he and his wife only who resided at Soldiers' Grove; that his wife became sick, and because of her sickness went away from Soldiers' Grove, and has remained sick ever since, and for that reason he broke up housekeeping there and sold off some of his furniture, but he remained, up to about the time of this assignment, at and about Soldiers' Grove, attending to his business interests as he had done for several years previous. There is no question that the firm of Nowlin & Co. did business in Crawford county; that Soldiers' Grove was their place of business; that they had no place of business outside of this state; and that, as a firm, Nowlin & Co. existed in the county of Crawford and nowhere else. I have no question that the residence of this firm was such that they could make an assignment of their property in the state of Wisconsin and nowhere else. No one of these particular matters, suggested as being sufficient to invalidate the assignment, is sufficient to invalidate it, and all taken together do not invalidate the assignment."

These remarks fully dispose of all the objections taken to the validity of the assignment. Upon the evidence, therefore, we think it was not error to withdraw the question as to its validity from the consideration of the jury; for a verdict that the assignment was invalid and fraudulent as to creditors would have been wholly unwarranted.

By the Court.—The judgment of the circuit court is affirmed.

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PETERSON, Appellant, vs. BAKER, Garnishee, etc., Respondent.

March 3 — March 22, 1887.

First Nat. Bank v. Baker, ante, p. 442, followed.

APPEAL from the Circuit Court for *Crawford* County.

For the appellant there was a brief by *Brooks & Dutcher*, and oral argument by *Mr. Brooks.*

John D. Wilson, for the respondent.

COLE, C. J. This case involves the same questions of law and fact as those presented in *First Nat. Bank v. Baker*, *ante*, p. 442, and must be ruled the same way.

By the Court.—The judgment of the circuit court is affirmed.

KEEP, Respondent, vs. QUALLMAN, imp., Appellant.

March 3 — March 22, 1887.

Assault and battery: Self-defense: Court and jury: Evidence.

1. In an action of assault and battery the evidence tended to show that when the defendant asked the plaintiff why the latter had slandered him the plaintiff immediately thrust his hand into his pocket and was about to draw it out again when the defendant knocked him down; and that the defendant had been warned that the plaintiff had threatened to inflict personal injury upon him and was a dangerous man and in the habit of shooting people. *Held*, that the question whether the defendant was justified in striking the plaintiff to prevent the latter from attacking him, should have been submitted to the jury.
2. Evidence of the quarrelsome and violent disposition of the plaintiff was admissible in such a case.

APPEAL from the Circuit Court for *Crawford* County.

This action was brought to recover damages for an assault and battery alleged to have been committed by the defendant upon the person of the plaintiff.

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The parties are neighbors, but not friends. On a certain Sunday afternoon they met in a public highway. Several other persons were present. The testimony tends to show that the defendant accosted the plaintiff by asking him, "What is the reason you are slandering me around all the time?" that immediately the plaintiff put his hand in his pocket, and was about taking it out again when the defendant struck him on the head with a cane twice, knocking him down. He got up and, as the defendant testifies, attacked the latter, whereupon they fought with their fists until plaintiff was vanquished and retreated. The defendant also testifies that he had just then heard that the plaintiff had told their neighbors to watch him; that previously he had been told that, at different times, the plaintiff had threatened to inflict personal violence upon him, and that plaintiff was in the habit of shooting people, and was a dangerous man; and when he put his hand in his pocket, the movement indicated to his (the defendant's) mind an intention to draw a revolver.

The court excluded other testimony offered by the defendant to show that the plaintiff was of a quarrelsome disposition and in the habit of using dangerous weapons. The jury were instructed that the defendant had shown no legal justification for the assault, and hence the defendant was liable to respond in damages therefor, and the case was submitted to the jury only for an assessment of damages. The damages were assessed at $175. A motion for a new trial was denied, and judgment was entered for the plaintiff pursuant to the verdict. The defendant appeals from the judgment.

The cause was submitted for the appellant on the brief of *C. S. Fuller*, and for the respondent on that of *Webster & Miller*.

To the point that an assault with a knife or revolver, sufficient to justify the use of violence in defense, must be by

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an actual exhibition of the weapon, and, if a gun or pistol, by a presentation thereof at the party assaulted, counsel for the respondent cited *Tarver v. State*, 43 Ala. 354; *Higginbotham v. State*, 23 Tex. 574; *State v. Epperson*, 27 Mo. 255; *State v. Church*, 63 N. C. 15; *Lawson v. State*, 30 Ala. 14; *Warren v. State*, 33 Tex. 514; *Woodruff v. Woodruff*, 22 Ga. 237.

LYON, J. It was not unlawful for the defendant to address the plaintiff as he did when they met on the highway, and if the plaintiff by his former threats of personal violence (if he made any), and by putting his hand in his pocket as testified to by the defendant (if he did so), gave the defendant reason to believe that he was about to draw a revolver or other weapon upon him, it was an assault, and the defendant had the right to act upon appearances and at once repel or prevent the supposed contemplated attack. See 1 Whart. Crim. Law, §§ 603-606. We think the testimony sufficient to send to the jury the question whether the acts of the plaintiff were sufficient to give the defendant reason to believe that he was in imminent danger of being attacked by the plaintiff when he knocked the latter down. That is to say, we think the testimony tends to prove a state of facts from which the jury might properly find the defendant was legally justified in striking the blows to prevent the plaintiff from attacking him. Hence the instruction that the defendant was absolutely liable in the action was erroneous. The instruction should have been that if the defendant had no reasonable grounds to fear an immediate attack by the plaintiff, or, having such grounds, if he used more force than was necessary to prevent such attack, the plaintiff could recover; otherwise not.

We are also inclined to think that on the authority of *State v. Nett*, 50 Wis. 524, proof of the quarrelsome and violent disposition of the plaintiff should have been received,

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as elements in the correct solution of the questions above suggested.

By the Court.—The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

WILLARD, Appellant, vs. BOSSHARD, Respondent.

March 3—March 22, 1887.

Statute of frauds: Promise to pay debt of another.

An oral promise by an employer to a creditor of his employee to pay the debt at the end of sixty days if the employee continued to work for him during that time,—the contract of employment being for a longer time than sixty days, and the creditor not releasing his claim against the employee or extending the time for its payment,—is within the statute of frauds and void.

APPEAL from the Circuit Court for *La Crosse* County. The case is stated in the opinion.

For the appellant there was a brief by *Fruit & Brindley*, and oral argument by *Mr. Fruit.* To the point that the defendant merely undertook to pay *his own debt* in a particular way, and that it was a promise founded upon a new and sufficient consideration moving to the promisor from the debtor at the time the promise was made, they cited *Putney v. Farnham*, 27 Wis. 187; *Hoile v. Bailey*, 58 id. 434; *Calkins v. Chandler*, 36 Mich. 320; *Bates v. Donnelly*, 57 Mich. 561; *Farley v. Cleveland*, 4 Cow. 432; *Young v. French*, 35 Wis. 111; *Stoudt v. Hine*, 45 Pa. St. 30; *Clymer v. De Young*, 54 id. 118; *Justice v. Tallman*, 86 id. 147; Browne on Stat. of Frauds, sec. 187.

For the respondent there was a brief by *Prentiss, Hughes & Miller*, and oral argument by *C. L. Hood.*

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TAYLOR, J. On May, 4, 1885, one Fisher was indebted to the appellant, *Willard*, in the sum of about $33. At that time Fisher was in the employ of the respondent, *Bosshard*, who was a farmer, under a contract to work for said *Bosshard* during the whole season and receive his pay in the fall. The appellant was anxious to collect his claim against Fisher, and on that day saw *Bosshard* and asked him if he would pay the debt of Fisher. *Bosshard* replied that he did not owe Fisher anything, and could not pay the claim; that there was not that amount due Fisher then. *Willard* wished to know when there would be enough due. *Bosshard* replied that if Fisher worked sixty days longer there would be enough coming to him, and that if Fisher continued to work for him sixty days longer, and he (Fisher) was willing, he would then pay *Willard* his claim against Fisher. Fisher was consulted, and he consented to such arrangement. *Willard* then asked *Bosshard* to sign a due-bill for the amount, but *Bosshard* refused to sign it, saying his word was as good as his note. Fisher continued to work for *Bosshard* the sixty days, after which *Willard* demanded his pay from *Bosshard*, who refused to pay, alleging as a reason that he did not owe Fisher that amount, as Fisher in the meantime had drawn his pay for other purposes. It is also claimed by *Willard* that there was evidence tending to show that he sold his claim against Fisher to *Bosshard* for the sum of $30, to be paid in sixty days from the 4th day of May, 1885, on the condition that Fisher remained in his employ for that length of time.

On the trial the appellant was nonsuited on the ground that the contract proved was void under the statute of frauds; that it was a promise to pay the debt of another and, not being in writing and not founded on any new consideration, was void.

We think the learned circuit judge was clearly right in holding the contract as proved void under the statute.

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There is no new consideration for the defendant's promise. The evidence does not show that the plaintiff surrendered any right to enforce his claim against Fisher in consideration of the promise of *Bosshard* to pay the same at the end of sixty days if Fisher remained so long in his employ. For anything which passed between the parties, *Willard* could have maintained an action against Fisher at any time during the sixty days to recover his debt of him. It is clear there was no release of his claim against Fisher on the conditional promise of *Bosshard* to pay it. Had Fisher left the employ of *Bosshard* before the expiration of the sixty days, it is very clear that *Willard's* claim against Fisher would not have been extinguished. It was to be extinguished conditionally, and the condition was clearly not only that he should work the sixty days for *Bosshard*, but that *Bosshard* should then pay the claim to *Willard*. There is nothing in the contract as proved that would justify a jury in finding that if Fisher worked the sixty days his debt to *Willard* should be satisfied and paid.

If the debt of Fisher had been satisfied by the contract with *Bosshard*, it may be admitted that the contract would bind *Bosshard*, though not in writing. In such case the release of his claim against Fisher at the request of *Bosshard*, on his promise to pay his (Fisher's) debt, would be a new and sufficient consideration to uphold his promise to pay the debt. The injury resulting to the promisee by his release of the debt due from Fisher to him would support the promise of *Bosshard* to pay the debt. It is evident there was no such release of the debt due from Fisher at the time this new contract was made. The fact that the plaintiff says he was willing to receive $30 for his claim of $33, and that *Bosshard* should have the benefit of his entire demand against Fisher, is conclusive that there was no intention to satisfy and discharge the debt due from Fisher.

There being no release of the debt due from Fisher, was

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there any other consideration for the defendant's promise? We are unable to find any upon the evidence in the case. As said above, there was no agreement even to give Fisher sixty days further credit on account of this promise. Nor was there any new consideration moving from the debtor, Fisher, to the defendant, to uphold the promise. Fisher did not promise to work the sixty days if he would promise to pay his debt due to *Willard*. He had already promised to work that long and longer upon a contract previously made with *Bosshard*. *Bosshard* got no benefit from this new promise, as he was not bound by his original contract to pay Fisher within the sixty days. He got, therefore, by the contract, no extension of time for the payment of his debt to Fisher. On all the evidence it was a mere naked promise to pay the debt of Fisher to *Willard* at the end of sixty days if Fisher remained in his employ under his contract theretofore made with *Bosshard*, and by the terms of which he was bound to remain in his employ that time and longer. In the meantime the debt against Fisher remains unsatisfied, and no extension of time for the payment thereof is given by plaintiff to Fisher.

The evidence fails entirely to show a valid promise to pay the debt of Fisher. The facts are not as strong in favor of the plaintiff as they were in the case of *Clapp v. Webb*, 52 Wis. 638. The facts do not bring this case within the rule laid down in *Hoile v. Bailey*, 58 Wis. 434; *Kollock v. Parcher*, 52 Wis. 399, 400, and other cases cited in these decisions. In the case at bar there was no debt due from the defendant to Fisher at the time he, with Fisher's assent, agreed to pay the plaintiff's claim, nor can it be said that the work he did, after the promise was made by *Bosshard* to *Willard*, was done in consideration of such promise. The work was done under the original contract between *Bosshard* and Fisher, which was in force when the promise was made, and continued in force thereafter. The debt which he owed Fisher

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did not accrue to him upon an original agreement to work for *Bosshard* sixty days if he would pay *Willard* $33 he (Fisher) owed him, and does not, therefore, come within the case of *Hoile v. Bailey*, *supra*, and others cited in that case.

It is hardly necessary to say that there is not sufficient evidence to sustain the claim now made that there was evidence in the case to show a sale of plaintiff's account against Fisher to *Bosshard*, to be paid for at the end of sixty days if Fisher remained that length of time in his employ; and no such claim is made in the complaint.

By the Court.—The judgment of the circuit court is affirmed.

AUSTIN, Respondent, vs. MOE, Appellant.

March 4—March 22, 1887.

Instructions to jury: Duty of court and of counsel: Contracts: Board furnished to mother-in-law.

Where the court has correctly charged the jury upon all the main questions involved, the failure to give additional or more specific instructions, which were not requested by counsel, is not error. So *held*, where the question raised by the pleadings was whether there had been an *express* contract by a mother-in-law to pay her son-in-law, with whom she lived, for her board, and the court had charged the jury that she would not be liable to pay for such board in the absence of an agreement, but had failed to instruct the jury that they should consider all the circumstances for the purpose of determining whether or not an agreement should be *implied* or inferred therefrom.

APPEAL from the Circuit Court for *La Crosse* County.

The case is sufficiently stated in the opinion.

C. L. Hood, for the appellant.

For the respondent there was a brief by *Fruit & Brindley*, and oral argument by *Mr. Fruit.*

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ORTON, J. The cause of action insisted upon is a note for $700 given by the appellant to the respondent, November 1, 1880, due at any time. The answer states, in substance, that the plaintiff is the mother of the defendant's wife, and in 1871 came to live with them in their family, and was maintained and taken care of by them until the year 1880, when the said defendant procured for her a pension from the United States of eight dollars per month, and back pay of about $1,600, and paid the expenses of procuring the same, and the plaintiff thereupon paid the defendant $700 of said money in consideration of her past support and maintenance, and in full settlement thereof, and for the balance of said money the defendant gave the plaintiff said note, and that it was then agreed between them that said plaintiff should in the future pay to the defendant a reasonable sum for her board, lodging, for being cared for in sickness, and for such necessaries as she might require; and he continued to perform his agreement in these respects from that time until about two weeks before the commencement of this suit, and that her board so furnished was reasonably worth three dollars per week, which in the aggregate was, up to the time last mentioned, the sum of $696, and that the defendant in the mean time paid the plaintiff, and for her, about the sum of $140 in money, and these sums are claimed as offsets to said note.

The evidence shows that the plaintiff was quite aged and indigent when she went to live with the defendant, and she left his family about the time last stated. The plaintiff and defendant were the only witnesses, as appears from the printed case. The defendant testified that he was to have half of the pension money, if he got it for the plaintiff, for his getting it and for furnishing her a home as he had, or for what he had done for her, and that she wanted to continue at his house as she had been, and wanted him to build an addition to his house that she might have a room up-

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stairs and a fire and light, and that he built the addition, furnished her with a separate room, with fire and light, and had the wood carried up in cold weather, and made the fire for her morning and evening, and that this note was to be paid by his furnishing her a home, and it was agreed that it should be so paid, and that she did no manual labor around the house ordinarily, and the way he kept her after this house was built was worth five dollars per week. The plaintiff testified that it was $800 the defendant kept, over and above the expenses of getting the pension, and that there was no talk about his having it for what he had done for her; that she told him if he could get the pension he might have half of it; that she worked enough to pay her board; her health was pretty good for an old person, and she did not need much medical attendance; that she never agreed to let the defendant have the $800 for her board, and did not agree to pay him $3 for her board in future when she took the note in suit. There was evidence of the defendant having furnished the plaintiff some money and paid some bills, for which it is understood the jury gave the defendant credit in finding a verdict for the plaintiff for $807.43 on the note and interest.

The circuit court instructed the jury as follows: "In the relation these parties stand to each other, and in the situation in which they have been living together, the plaintiff would not be entitled to pay the defendant for her board unless there was an agreement that she should pay it," etc. "The defendant claims that there was an agreement on the part of the plaintiff that she should pay him what was reasonable for her board, after the time she obtained her pension,—substantially after the date of this note, as I understand it,—and she denies that there was any such agreement. Now, as I said before, unless there was an agreement that she should pay she would not be liable to pay it." The learned counsel of the appellant

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excepted to this part of the charge, as follows: "I except to the remarks of the court to the effect that the plaintiff would not be entitled to pay for her board unless there was an agreement, when she lived with her son-in-law." There was a motion made to set aside the verdict because it was against evidence, and the motion was overruled, and the defendant excepted. In respect to this last exception, the learned counsel of the appellant have not asked in their brief for a reversal of the judgment because the verdict was against the evidence. They were probably aware that there was no certificate of the judge to the bill of exceptions that it contains all the evidence given on the trial. This exception will therefore be disregarded, and the above exception to the charge of the court to the jury will alone be considered.

The above statement of the pleadings and of some of the evidence has been made in order to show fully the reasons for the decision that we feel compelled to make. The learned counsel who argued the case does not dispute the legal proposition that services rendered between members of the same family raise no presumption of fact that they are to be paid for, or the proposition that the plaintiff's living and receiving her support and maintenance in the family of the defendant, from the time she came there until she received her pension, raised no presumption of fact that either she should be paid for the services she might render the defendant under such circumstances or that she would or should pay the defendant for such support and maintenance, or that he should be entitled to charge her for the same. To go further, I do not understand that the learned counsel questions the legal principle that, considering the relationship between the plaintiff and defendant, as mother-in-law and son-in-law, during the whole time she was an inmate in his family he was not entitled to any compensation or remuneration for her board, support, and maintenance therein,

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unless it was agreed between them that he should be paid by her for such support, and that the liability in such a case depends wholly upon contract; but his contention is: *first*, that there was evidence of such an express contract, at least from the time the plaintiff received her pension; and, *secondly*, that the jury should have considered the changed conditions and circumstances of the parties from that time, and that she exacted and received accommodations, comforts, and attentions from that time consistent and commensurate with her ability to pay for them as any other boarder, and found from these facts and circumstances a contract on her part to pay for them, or an understanding between them that she would thereafter pay and that he would receive payment for her board. His complaint is that the court instructed the jury, in the above part of the charge, that "she would not be entitled to pay for her board, unless there was an agreement, when she lived with her son-in-law," or "unless there was an agreement that she should pay it," as in the charge. The learned counsel very ably and plausibly contends that the jury must have understood from this instruction that there must have been a special or an express contract to this effect established by positive evidence, and that they had no right to infer that there was such a contract or understanding from the above facts and circumstances, and that this instruction shut out from the jury all consideration of such facts and circumstances from which a contract might have been properly inferred or implied; and, further, that the court erred in not giving an instruction to the jury that they should consider these facts and circumstances with that view and for such purpose.

The argument of the learned counsel is strong, logical, and convincing that these facts and circumstances ought to have been considered by the jury in determining whether there was such a contract as the law makes necessary in such a case. But we can go no further with the learned

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counsel. There was a duty, in such case, resting upon the counsel as well as upon the court. The court had given the jury a proper instruction that there must, in such a case, be a contract. All agree that such is the law. He did not go further, and call the attention of the jury to any facts or circumstances by which they might determine whether there was a contract, but simply told them that the defendant had testified that there was, and the plaintiff had testified that there was not, such a contract. It must not be forgotten that, upon this question of the contract liability to pay the defendant for her board and support after such change in her financial circumstances in 1880,—and it is conceded that such liability must rest upon contract,—the answer of the defendant tenders but one issue, and that is that it was expressly agreed between the parties at that time that the defendant should be paid a reasonable sum for her board, etc., in the future. It is true, the answer sets out such change in her support and treatment at that time, but it does not allege or intimate that a *contract* should be inferred or implied therefrom, but alleges, in connection therewith, that such express contract was made. And, furthermore, the defendant in his testimony states two express contracts,—one as above, and the other that this note should be paid by the defendant furnishing her with a home and support in such manner for the future. The answer sets up this contract for board, and pleads a setoff therefor of three dollars per week. These contracts are specifically denied by the plaintiff in her testimony. There was nothing, therefore, in the pleadings or evidence to apprise the court or the opposite counsel that the learned counsel of the defendant relied upon these facts and circumstances to establish a contract by inference or implication, and the charge of the court squarely and fully met the case so made by the pleadings and evidence; and the jury were instructed that, to allow the defendant's claim, they must find such contract

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so alleged was actually made, and went no further. This instruction was correct and sufficient. Here there was a duty clearly imposed upon the defendant if he wished the court to go further and instruct the jury that they might consider such facts and circumstances with a view of ascertaining *therefrom* that such a contract was made. His counsel should have specially requested the court to so instruct the jury, or called the attention of the court then and there to such *now* alleged omission. If, after such a request, the court had refused to do so, it would quite probably have been an error fatal to the verdict. As a general rule, such a contract is inferred from facts and circumstances, and much oftener than established by positive evidence. *Emerson v. Durand*, 64 Wis. 111.

I have spent more time upon this case, because it more clearly than most cases squarely and directly presents this question of the relative duty of the court and the counsel as to an omission to instruct the jury upon some matter, very material perhaps, but not obviously within the pleadings or the evidence. Such omissions are frequently alleged as error in this court, and the true rule should not be overlooked. When the court has instructed the jury upon all the main questions involved, and correctly, then, if counsel desire additional or more specific instructions, they must request them to be given or the omission cannot be alleged as error. *Brower v. Merrill*, 3 Pin. 46; *Lachner v. Salomon*, 9 Wis. 129; *Pilling v. Otis*, 13 Wis. 495; *Knox v. Webster*, 18 Wis. 406; *Karber v. Nellis*, 22 Wis. 215; *Weisenberg v. Appleton*, 26 Wis. 56; *Roebke v. Andrews*, 26 Wis. 311; and many cases since decided. In this case, therefore, the omission complained of was not the error of the court.

By the Court.— The judgment of the circuit court is affirmed.

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PICKERT, Appellant, vs. MARSTON and another, Respondents.

March 4 — March 22, 1887.

Agency: Sale of chattels: Warranty.

An agent employed to sell has no implied power to warrant unless the sale is one which is usually attended with warranty.

APPEAL from the Circuit Court for *La Crosse* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

The complaint in this action was, in effect, upon an account for goods, wares, and merchandise sold and delivered by the plaintiff, of Boston, to the defendants at La Crosse, at their request, September 23, 1884, on a credit of sixty days, at the agreed price of $78.25, and which were reasonably worth that sum; that no part of it had been paid, but was due, with interest, from November 23, 1884, for which judgment with costs was demanded. The answer was to the effect that about September 1, 1884, the defendants contracted with the plaintiff to send them a quantity of codfish, which he guarantied should stand shipment and arrive in La Crosse in good, sound, merchantable condition; that when the fish shipped arrived in La Crosse they were spoiled and wholly worthless; that the defendants, supposing them good, paid thereon $20 freight, and that their storage and care thereof was worth $10, and hence counterclaimed $30. The plaintiff, replying, denied the counterclaim. From the judgment in favor of the plaintiff and against the defendants in the justice's court, the latter appealed to the circuit court; and, upon the retrial therein, the jury found for the defendants and assessed against the plaintiff the freight paid to the amount of $10. From the judgment entered thereon the plaintiff appeals.

For the appellant there was a brief by *Bleekman, Tour-*

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tellotte & Bloomingdale, and oral argument by *Mr. Bleekman*. To the point that the agent had no implied authority to warrant unless that was the usage of trade as to the particular class of goods in question, they cited Story on Agency, secs. 60, 87, 96, 106, 225–6; Addison on Cont. sec. 631; Benjamin on Sales, sec. 624; 1 Pars. on Cont. 60, 61; *Atlas Mining Co. v. Johnston*, 23 Mich. 36; *Kornemann v. Monaghan*, 24 id. 36; *McKindly v. Dunham*, 55 Wis. 515; *Komorowski v. Krumdick*, 56 id. 23; *Walls v. Bailey*, 49 N. Y. 464; *F. & M. Nat. Bank of Buffalo v. Sprague*, 52 id. 605; *Lawry v. Russell*, 8 Pick. 360; *Herring v. Skaggs*, 62 Ala. 180; *S. C.* 34 Am. Rep. 4; *Cooley v. Perrine*, 41 N. J. Law, 322; *S. C.* 32 Am. Rep. 210; *Upton v. Suffolk Co. Mills*, 11 Cush. 586; *Jones v. Warner*, 11 Conn. 40; *Goodnow v. Tyler*, 7 Mass. 36.

C. L. Hood, for the respondents.

CASSODAY, J. The evidence is undisputed that the fish were in good condition when shipped to the defendants from Boston, and worthless when they reached the defendants at La Crosse. The defendants made the contract of purchase at La Crosse with the plaintiff's traveling salesman, who resided at Chicago. There was evidence tending to prove that the fish shipped were not the fish ordered; and also that by the terms of the contract the fish ordered were guarantied by the traveling salesman to reach the defendants in La Crosse in good merchantable condition. The evidence on the part of the plaintiff was to the effect that the traveling salesman had no authority to make such guaranty, nor any assurance as to the condition in which the fish should be on reaching La Crosse; and that he so informed the defendants about a month prior to the taking of the order in question. The issue made does not arise between the principal and agent, but between the principal and the defendants who made the contract of purchase

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with the agent. The agency and the right to contract for the sale are admitted. But the authority to make the guaranty or warranty is denied. Beyond question, an agent may bind his principal if he does not exceed the power with which he is ostensibly invested, notwithstanding he has secret instructions from his principal to the contrary. *Putnam v. French*, 53 Vt. 402; *Bentley v. Doggett*, 51 Wis. 224; *Bouck v. Enos*, 61 Wis. 664. Assuming that the traveling salesman had no actual authority to make such guaranty or warranty of the fish, then it became important to determine whether his authority to sell or contract for the sale clothed him with an implied authority to make such guaranty or warranty. "The general rule is, as to all contracts, including sales," said a late learned author, "that the agent is authorized to do whatever is *usual* to carry out the object of his agency, and *it is a question for the jury* to determine what is *usual*. If, in the sale of the goods confided to him, it is *usual* in the market to give a warranty, the agent may give that warranty in order to effect a sale." 2 Benj. Sales (4th Am. ed.), § 945, p. 824. The text is supported by the citation of numerous authorities. See *Bayliffe v. Butterworth*, 1 Exch. 425; *Graves v. Legg*, 2 Hurl. & N. 210; *Dingle v. Hare*, 97 Eng. C. L. 145; *Upton v. Suffolk Co. Mills*, 11 Cush. 586, 59 Am. Dec. 163; *Herring v. Skaggs*, 62 Ala. 180, 34 Am. Rep. 4; *Smith v. Tracy*, 36 N. Y. 82; *Ahern v. Goodspeed*, 72 N. Y. 108.

Thus, in *Dingle v. Hare*, *supra*, ERLE, C. J., observed: "The strong presumption is that when a principal authorizes an agent to sell goods for him he authorizes him to give all such warranties as are *usually* given in the particular trade or business;" and BYLES, J., added: "An agent to sell has a general authority to do all that is *usual* and necessary in the course of such employment." So in *Smith v. Tracy*, *supra*, PORTER, J., speaking for the court, said: "The rule applicable to such a case is stated with discrimination and

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accuracy in our leading text-book (Parsons) on the law of contracts: 'An agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is *usually* attended with warranty.'"

Here the plaintiff offered to prove, by different witnesses having the requisite knowledge, the general custom of the trade as known and universally followed by dealers in fish, as to their being warranted or guarantied against spoiling or turning red in transit; but it was excluded and, as we think, erroneously, under the rules of law above stated. It would seem, however, that to be binding upon the defendants, such custom should be known to them or exist in their section of the country. Thus, in *Graves v. Legg*, *supra*, it was said by COCKBURN, C. J.: "The only question is whether, when a merchant residing in London contracts with a Liverpool merchant in Liverpool, he is bound by the *usage* of trade at Liverpool. We think that as he employed an agent at Liverpool to make a contract there, it must be taken to have been made with all the incidents of a contract entered into at Liverpool, and one is that notice to the buyer's agent is notice to the principal."

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

See note to this case in 32 N. W. Rep. 550.—REP.

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FICK, Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 4—March 22, 1887.

Railroads: Master and servant: Liability for torts: Scope of employment: Special verdict.

1. A ticket agent left another employee in charge of the ticket office, who failed to return the proper change upon the sale of a ticket and, upon being asked therefor by the purchaser, assaulted and struck the latter. *Held*, that the railroad company was liable for such acts of its employee.
2. Where the facts found by a special verdict conclusively showed that wrongful acts of an employee were done in the course of his employment, a further finding that such acts were not done in the course of his employment is treated as a mere erroneous conclusion of law.

APPEAL from the Circuit Court for *Monroe* County.

Action to recover damages for injuries occasioned by an assault upon the plaintiff by one of the defendant's employees. The complaint alleges that the plaintiff applied at the station at Wilton for a ticket to Norwalk, and handed to the person in the ticket office fifty cents to take therefrom the price of the ticket, which was twenty cents; that such person handed to him the proper ticket, but only returned ten cents in change; that the plaintiff having called attention to the mistake, the said agent or employee refused to return the balance, came out of the ticket office in an angry manner, and passed to the platform; that the plaintiff again requested such agent to return the change, and that thereupon the agent assaulted and struck him.

The answer alleged that the plaintiff with two or three companions, all grossly drunk, entered the station at Wilton and commenced an assault upon one E. W. Davis, who was then and there engaged in the business of mail carrier from the postoffice at Wilton to the trains of the defendant,

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and that the said Davis resisted as he lawfully might. Otherwise the answer denies the allegations of the complaint.

The jury returned a special verdict. The facts found therein will sufficiently appear from the opinion. The jury also assessed the plaintiff's damages at $200. Both parties moved for judgment on the special verdict. The motion of the plaintiff was granted, and from the judgment entered accordingly the defendant appealed.

For the appellant the cause was submitted on the brief of *Jenkins, Winkler, Fish & Smith.* They contended that the wrongful act of the employee being outside the scope of his employment and wilful, the company was not liable. 2 Rorer on Railroads, 1192; *Craker v. C. & N. W. R. Co.* 36 Wis. 669; *Johnson v. C., R. I. & P. R. Co.* 58 Iowa, 348; *L. M. R. Co. v. Wetmore,* 19 Ohio St. 110; *Batton v. S. & N. A. R. Co.* 22 Cent. L. J. 467.

For the respondent there was a brief by *Bleekman, Tourtellotte & Bloomingdale,* and oral argument by *Mr. Bleekman.* They argued, among other things, that the principal is liable for the wilful or malicious misconduct of an agent in the course of his employment, as well as for injuries resulting from his negligence. 1 Wait's Act. and Def. 282; 2 id. 75–6; 4 id. 410–11; Rorer on Railroads, 826; *Wood v. Detroit City R. Co.* 23 Am. Law Reg. 243, note; *Ramsden v. B. & A. R. Co.* 104 Mass. 117; *Goddard v. G. T. R. Co.* 57 Me. 202; *S. C.* 2 Am. Rep. 39; *Marion v. C., R. I. & P. R. Co.* 59 Iowa, 428; *Bryant v. Rich,* 106 Mass. 180; *Hanson v. E. & N. A. R. Co.* 62 Me. 84; *S. C.* 16 Am. Rep. 404; *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Stewart v. B. & C. R. Co.* 90 N. Y. 588; *Sherley v. Billings,* 8 Bush, 147; *S. C.* 8 Am. Rep. 451. The master is likewise liable for the acts of a person whom his servant employs to assist in the performance of work. *Althorf v. Wolfe,* 22 N. Y. 355; *Railroad Co. v. Gallagher,* 23 Am.

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Law Reg. 593, note. Common carriers are not only liable for the torts and wilful misconduct of their agents, but on account of the contract relations existing between the parties, they owe to a passenger the further duty of protecting him from injury, and the law requires them to exercise the highest degree of care that human judgment and foresight are capable of, to make the passenger's journey safe. *P., Ft. W. & C. R. Co. v. Hinds*, 53 Pa. St. 512; *P. & C. R. Co. v. Pillow*, 76 id. 510; *Flint v. N. & N. Y. Transp. Co.* 34 Conn. 554; Wood on M. & S. sec. 321, p. 645, note 3.

Cole, C. J. The plaintiff had purchased a ticket at the ticket office at Wilton for his transportation to Norwalk, so the relation of carrier and passenger existed at the time of the assault. It is needless to say that the company and its agents owed him fair and proper treatment while this relation existed. The jury found that one Fred E. Davis was the station agent at Wilton when the ticket was purchased; that Edward W. Davis was employed at Wilton to carry the mail from the trains to the post office, and was employed in no other capacity; that at the time in question the plaintiff purchased of Edward W. Davis, temporarily in the ticket office at Wilton by permission of Fred E. Davis, a ticket to Norwalk, the price of which was twenty cents, and tendered him fifty cents in payment thereof; that Edward W. Davis returned to the plaintiff too small an amount of change, and informed him that they had no change and would either send it to him or hand it to him when he came again; that Edward W. Davis committed the first assault upon the plaintiff at this time; and that the plaintiff was intoxicated.

Upon these simple facts the conduct of the employee, Edward W. Davis, in assaulting the plaintiff would appear to be wholly indefensible and without any legal excuse. The

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plaintiff had given him money to pay for his ticket, and he was entitled to have his correct change returned. It was natural that he should ask for it and persist in demanding it. The agent had no possible right or justification for assaulting him because he did insist upon the correct amount of change being returned. Of course, the defendant owed the plaintiff the duty of treating him respectfully and properly. Certainly it was bound to protect him against the violent acts or misconduct of its agents. There would probably be no controversy as to the correctness of this view of the law, or as to the liability of the defendant for the wilful act of a servant while acting in the course of his employment.

It is said that Edward W. Davis was not the station agent at Wilton, but was merely employed to carry the mails from the trains to the post office, and was employed in no other capacity. But he was in the ticket office, sold the plaintiff a ticket, and received pay therefor. It is alleged in the complaint that the plaintiff went to the station for the purpose of taking passage on the train due in a few minutes, and purchased a ticket of an employee in charge of the office. Now, while it may be true that Edward W. Davis was not the regular ticket agent, yet under the circumstances he must be regarded as authorized to issue the ticket. The special verdict finds that at this time the "fracas" occurred, or the unlawful assault was committed. Now, to say that Edward W. Davis was a servant of the defendant in selling the ticket and receiving pay for it, but while in the act of refusing to return the proper change and in making the assault was acting outside the course of his employment, is refining too much upon the transaction. It is not as though the fracas had occurred at a subsequent time and place disconnected with the act of selling the ticket and making change. Of course, the rule is familiar that the master is liable for the torts of his servant only when

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they are committed in the course of his employment, and we do not intend to disregard that rule here. It is often difficult to determine what acts should be deemed within the course of the employment; but it seems to us, upon the facts, that the assault made upon the plaintiff is one for which the defendant is liable. It would be unjust to hold that the defendant, which was bound to use all due diligence to carry the plaintiff safely to his destination, was not bound to protect him against the violent act of its servant under the circumstances of the case. True, the jury, in answer to the fourteenth question, find that the striking of the plaintiff by Edward W. Davis was not done by him in the course of his employment. But this, in view of the other findings, amounts only to a conclusion of law, and is not controlling as to the fact. It is like the question presented in *Hogan v. C., M. & St. P. R. Co.* 59 Wis. 139, where it was held that, if the special findings by the jury and the averments of the complaint conclusively show that the defendant was free from any negligence causing the injury complained of, a finding in the verdict that the defendant was guilty of such negligence will be treated merely as an erroneous conclusion of law, and will have no weight in determining what judgment should be entered. So here, where the other findings show that Edward W. Davis was acting in the course of his employment when he committed the unlawful act complained of, the fourteenth finding must be treated as an erroneous conclusion of law, which can have no weight in determining what judgment shall be entered.

By the Court.—The judgment of the circuit court is affirmed.

See note to this case in 32 N. W. Rep. 527.—REP.

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WASHBURN, by guardian *ad litem*, Appellant, vs. THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Respondent.

March 4 — March 22, 1887.

Negligence: Highways: Pleading.

1. In an action for negligence in constructing a railway across a highway, an allegation that the railway company "tore up, changed, destroyed, and excavated said highway," does not show that the *locus in quo* was no longer a public highway, but amounts only to an allegation that the use of said highway by the public was interrupted or destroyed.
2. Where the only averment directly affecting the question of negligence is that a person did an act negligently, or the opposite, such averment is one of fact.
3. A complaint showing that the plaintiff, a boy five years old, was injured by falling into a dangerous excavation where a railroad crossed a highway, and alleging that neither he nor either of his parents was guilty of any negligence, but not showing whether the plaintiff was attended by any person at the time of the injury, or the circumstances under which he fell into the excavation, is *held* not to show that the plaintiff or either of his parents was guilty of negligence, but the reverse.

APPEAL from the Circuit Court for *Monroe* County.

The action was brought in 1885 to recover damages for personal injuries received by the plaintiff because of the alleged negligence of the defendant. This appeal is from an order sustaining a general demurrer to the complaint.

The complaint alleges that the plaintiff, *Lawrence Washburn*, is a minor seventeen years of age; that George W. Washburn was duly appointed his guardian to prosecute this action; that at the times mentioned therein the defendant company was a corporation, and constructed and operated a railroad through the counties of La Crosse and Monroe, and through the village of Onalaska in the former county, and that it constructed its railroad across a certain public highway or street in common use running though

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said village westerly down to the Black river, which at the point of crossing slopes abruptly towards said river. The complaint then alleges as follows:

"That the defendant, in constructing its said railroad across said highway or street as aforesaid, tore up, changed, destroyed, and excavated said highway or street, and erected and constructed, as a part of its said railroad and under and as a support for its railroad track to rest on at said point, a perpendicular structure or frame work of timber extending about sixteen feet in depth below the level of such track and below the natural surface of said highway or street at said point, and of the width of said railroad track, and about fifteen feet in length across the traveled portion of said highway or street, with thick, heavy planks at the bottom thereof, and with no covering over the same other than the track rails and railroad ties necessary for laying its track rails on, between which said ties were large open spaces, and that, when such structure or frame work was so constructed and said railroad ties and said track rails laid thereon, it left the easterly side of said track on a level with the surface of said highway or street, while on the westerly side of said track was a perpendicular descent of about sixteen feet, and underneath said track was left an open space, cavity, or excavation of said depth of about sixteen feet, with thick, heavy planks at the bottom, and extending said distance of fifteen feet in length across the traveled part of said highway or street as above described, and of the width of said railroad track; that there were dwelling-houses occupied by people within a few feet of said open space, cavity, or excavation when said structure or frame work was erected, constructed, and completed.

"That in so constructing said structure or frame work, with said ties and railroad track rails thereon, said defendant tore up and destroyed said highway or street, and care-

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lessly, negligently, and wantonly failed to restore said highway or street to its condition of usefulness before it was so torn up and destroyed, and carelessly, negligently, and wantonly constructed said structure or frame work, with said ties and railroad track rails thereon as aforesaid, across said highway or street, without due and proper care necessary to render the crossing thereof as little dangerous as possible to the public in the use of said highway or street, or to avoid accidents at that place, and carelessly, negligently, and wantonly left said structure or frame work, with said ties and track rails thereon as hereinbefore described, for many years thereafter, and especially at the times and dates hereinafter mentioned, in a perilous, unprotected, and dangerous condition, without any covering of any kind over said open space, cavity, or excavation, except said ties with large spaces between them with track rails thereon, and carelessly, negligently, and wantonly failed and neglected to in any way protect or guard the same or its said railroad in said village of Onalaska, so as to prevent accidents and injuries at said place."

It is then alleged that in May, 1872, the highway or street and railroad crossing being in the condition above stated, the plaintiff, who was then but five years of age, "without any knowledge of the condition of said highway or street, or of said open space, cavity, or excavation, without any carelessness or negligence on his part or on the part of his said parents or either of them, passed onto and along said highway or street on the easterly or upper side of said open space, cavity, or excavation, and walked towards and into and fell through said open space, cavity, or excavation, with great force and violence onto said planks at the bottom thereof, and fractured his skull, and injured his heart, lungs, and other internal organs, and caused him great, serious, and permanent injuries in his head, body, and back."

The complaint concludes with a further statement of

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such injuries, and a demand of judgment for $20,000, and costs.

For the appellants there was a brief by *Bleekman, Tourtellotte & Bloomingdale*, and oral argument by *Mr. Bleekman:* The statute is explicit in requiring railway companies to restore highways which they intersect to their former condition of usefulness. R. S. 1858, ch. 79, sec. 11; Laws of 1872, ch. 119; R. S. 1878, sec. 1836; Rorer on Railroads, 545 *et seq.; Duffy v. C. & N. W. R. Co.* 32 Wis. 269; *Roberts v. C. & N. W. R. Co.* 35 id. 679. The defendant is also liable on common-law principles. Shearm. & Redf. on Neg. secs. 359, 360; 4 Wait's Act. & Def. 736; *Seymer v. Lake*, 66 Wis. 651. The owner of dangerous machinery who leaves it in an open place, though on his own land, is bound to use reasonable care to protect young children, attracted to play with it, from the danger to which they are thus exposed. *Keffe v. M. & St. P. R. Co.* 21 Minn. 207; *Railroad Co. v. Stout*, 17 Wall. 657; *Powers v. Harlow*, 53 Mich. 507. As to the degree of care which children of tender years are required to exercise, see Rorer on Railroads, 1028 *et seq.;* Id. 1068, note; *Railroad Co. v. Stout*, 17 Wall. 657; *Railroad Co. v. Gladmon*, 15 id. 401; *Collins v. S. B. R. Co.* 142 Mass. 301; *Townley v. C., M. & St. P. R. Co.* 53 Wis. 626; *E. S. City R. Co. v. Bohn*, 27 Mich. 504; *Thurber v. H. B., M. & F. R. Co.* 60 N. Y. 326; *McGovern v. N. Y. C. & H. R. R. Co.* 67 id. 417. The mere fact of plaintiff being in the highway at all, unexplained by other circumstances, is not *prima facie* evidence of negligence on the part of his parents, but the question is one for the jury. *Lynch v. Smith*, 104 Mass. 52; *Mulligan v. Curtiss*, 100 id. 512; *Bransom's Adm'r v. Labrot*, 50 Am. Rep. 193; *East Saginaw City R. Co. v. Bohn*, 27 Mich. 504; *O'Connor v. B. & L. R. Co.* 135 Mass. 352; *Collins v. S. B. R. Co.* 142 Mass. 301; *P., B. & W. R. Co. v. Layer*, 112 Pa. St. 414; *Hoppe v. C., M. & St. P. R. Co.* 61 Wis. 357; *Parish v.*

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Eden, 62 id. 272; *Dahl v. Mil. City R. Co.* id. 652; *Kay v. Penn. R. Co.* 3 Am. Rep. 628; *Strong v. Stevens Point*, 62 Wis. 255; *Schmidt v. M. & St. P. R. Co.* 23 id. 186; *Johnson v. C. & N. W. R. Co.* 49 id. 529; *Townley v. C., M. & St. P. R. Co.* 53 id. 626; Rorer on Railroads, 1072 *et seq.*; *Murphy v. Orr*, 96 N. Y. 14; *Mangam v. Brooklyn R. Co.* 38 id. 455; *Ihl v. F. S. Street R. Co.* 47 id. 317; *McGarry v. Loomis*, 63 id. 104; *Cosgrove v. Ogden*, 49 id. 255. The fact which a party is to prove should be pleaded, and not the evidence in support of the fact. Under this rule the allegation that neither the plaintiff nor his parents were negligent is the proper form of pleading. Bliss on Code Plead. secs. 208, 210, 211; *Titts v. Waldeck*, 51 Wis. 567; *Behm v. Armour*, 58 id. 1; *Potter v. C. & N. W. R. Co.* 20 id. 533; *Randall v. N. W. Tel. Co.* 54 id. 140; *Hoth v. Peters*, 55 id. 405; *Clark v. C., M. & St. P. R. Co.* 28 Minn. 69; *Grinde v. M. & St. P. R. Co.* 42 Iowa, 377; *Ekman v. Minn. St. R. Co.* 34 Minn. 24.

For the respondent the cause was submitted on the brief of *Jenkins, Winkler, Fish & Smith.* The complaint shows that the highway was destroyed, and hence shows no duty on the part of the company to the plaintiff. *Mason v. Mo. Pac. R. Co.* 27 Kan. 83-88. The parents of a child of tender years are *prima facie* guilty of contributory negligence in allowing the child to wander alone near dangerous excavations. *Hartfield v. Roper*, 21 Wend. 615, 618; *Callahan v. Bean*, 9 Allen, 401. The complaint having made out a *prima facie* case of contributory negligence, that fact is fatal on demurrer. *Hoth v. Peters*, 55 Wis. 405, 412. The allegation in the complaint that neither plaintiff nor his parents were guilty of contributory negligence is insufficient to negative this presumption. *Cahill v. Layton*, 57 Wis. 614; *Sullivan v. Waters*, 14 Ir. C. L. (N. S.), 464. The fact of the presence of a child in such dangerous place is sufficient, *prima facie*, to raise the presumption that he was

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there by permission of his parents. *St. L., I. M. & S. R. Co. v. Freeman*, 30 Ark. 49. That negligence of the parent is imputable to the child. *Gibbons v. Williams*, 135 Mass. 333; *Mangam v. B. R. Co.* 38 N. Y. 455–8; *Glassey v. H., M. & F. R. Co.* 57 Pa. St. 172, 174; *McGarry v. Loomis*, 63 N. Y. 106; *Chicago v. Starr*, 42 Ill. 174, 177.

LYON, J. The learned circuit judge sustained the demurrer on two distinct grounds. He held that it appears affirmatively by the allegations of the complaint (1) that the defendant company owed no duty to the plaintiff in respect to the manner in which it constructed and maintained its railroad at the place where the plaintiff was injured; and (2) that the parents of the plaintiff are chargeable with negligence in that they allowed him to go to such place. If either of these propositions is correct, the demurrer was properly sustained; otherwise, if neither of them can be upheld.

1. The proposition that the defendant owed no duty to the plaintiff, and hence as to him was not guilty of any negligence, seems to be rested upon the averment in the complaint that many years before the plaintiff was injured the defendant tore up and destroyed the highway, and it was never restored. Hence, it is claimed that the place of injury was not a public highway, and it does not appear that the plaintiff had any right to be there. Under the liberal rules for the construction of pleadings which now prevail, we think this is not a correct interpretation of the language of the complaint. Evidently it was not the intention of the pleader to allege that a public highway no longer existed at the *locus in quo*, but only that the use of the highway for public travel throughout the extent thereof was interrupted and destroyed by the construction of the railroad across it. The *locus in quo* remained a public highway after it was so obstructed, as before, and the plaintiff

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or any other person might lawfully go upon it and use it as such. Indeed, it may fairly be inferred from the averment that occupied dwelling-houses stood within a few feet of the place of injury, that the portion of the highway or street east of the railroad was in use as a public way when the plaintiff was injured.

Hence, we conclude that, under the averments of the complaint, the *locus in quo* was a public highway, upon which any person might lawfully travel, and that the defendant owed the duty to all persons traveling there, including the plaintiff, to make the approaches to its railroad, and the crossing of the street over the same, reasonably safe to such travelers. The complaint sufficiently shows that the defendant failed to perform this duty, but made and left unguarded a deep and very dangerous pit in the highway, into which the plaintiff (who, so far as is made to appear, was lawfully there) fell and was injured. This makes at least a *prima facie* case of negligence against the defendant.

2. The complaint fails to aver whether the plaintiff was attended or unattended by either of his parents or any other person when injured, or under what circumstances he went to the railroad track and fell into the pit. It is averred, however, that neither the plaintiff nor either of his parents were guilty of any carelessness or negligence contributing to the injuries complained of, and there is no averment of fact in the complaint from which negligence on the part of either can properly be inferred, except the averments that the plaintiff was in a dangerous place and was injured. It is said that such averment of freedom from negligence is a mere conclusion of law. This might be so were all the facts specially stated. In such case, if the facts showed negligence, then an averment or finding of no negligence would be regarded as an erroneous conclusion of law, and no force or effect would be given to it. This was done in

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Hogan v. C., M. & St. P. R. Co. 59 Wis. 139, which was such a case. But when, as here, the only averment directly affecting the question of negligence is that a person did an act negligently or the opposite, the averment must be regarded as one of fact, and effect given to it accordingly. Applying this rule here, it results that the complaint does not show the plaintiff or either of his parents guilty of any negligence in the premises, but the reverse. The force of the averment of due care or freedom from negligence is not destroyed or weakened by the failure of the pleader to explain why the plaintiff came to be at the place of injury.

The complaint may lack definiteness and certainty of statement, but we must hold that it states facts sufficient to constitute a cause of action.

By the Court.— The order is reversed, with a direction to the circuit court to overrule the demurrer.

WARREN and others, Appellants, vs. PUTNAM and another, Respondents.

March 5 — March 22, 1887.

Logs and timber: Damages for cutting: Good faith: Mistake of law.

One who acquired title to land with knowledge of facts which rendered such title invalid, or who learned such facts before cutting the timber, is not protected by sec. 4269, R. S., as amended by ch. 239, Laws of 1882, but is liable for the highest market value of the timber cut by him, even though he believed that such facts did not in law invalidate his title. But mere notice that another person claims to own the land is not inconsistent with good faith in cutting the timber.

APPEAL from the Circuit Court for *Monroe* County.

The case is stated in the opinion.

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For the appellants there was a brief by *I. C. Sloan* and *E. W. Helms*, and oral argument by *Mr. Sloan.*

For the respondents there were separate briefs by *Bleekman*, *Tourtellotte & Bloomingdale*, attorneys, and *Pinney & Sanborn*, of counsel, and the cause was argued orally by *Mr. Sanborn* and *Mr. Bleekman.*

TAYLOR, J. The plaintiffs brought their action to recover damages against the defendants for wrongfully cutting down and carrying away a large quantity of pine trees standing upon the land of the plaintiffs, and manufacturing the same into lumber at their mill situated in this state, and the plaintiffs claimed as damages the value of said lumber at the rate of $12 per thousand feet. The defendants by their answer admit the wrongful cutting and carrying away said pine trees and timber, and the manufacture of the same into lumber by them, but they contradict the allegations of the complaint as to quantity and value. They then set up facts which they claim bring them within the provisions of ch. 239, Laws of 1882, and offer to allow judgment to be entered against them for the sum of $606.60 and the costs of the action, which they allege is the full amount of the damages the plaintiffs are entitled to recover in the action.

There is no denial of the wrongful cutting and conversion of the plaintiffs' pine timber by the defendants, and the plaintiffs are, under the decisions of this court, entitled to recover as damages, under the provisions of sec. 4269, R. S., "the highest market value of such logs, timber, or lumber, in whatsoever place, shape, or condition, manufactured or unmanufactured, the same shall have been at any time before the trial while in possession of the trespasser," unless the defendants, by their answer and proofs upon the trial, have brought themselves within the provisions of said ch. 239, Laws of 1882. This chapter adds the following proviso to said section: "Provided, that in all actions hereafter

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commenced, when the defendant shall have in good faith acquired a title to and entered upon the land under the same, believing such title to be valid, and shall have cut the timber therefrom under such circumstances, then the plaintiff, if he shall recover, shall recover only the actual damage sustained by reason of such cutting. The defendant in his answer shall state the facts upon which he relies to establish such claim of title, and the burden of proof shall be on the defendant."

The facts established on the trial were in substance as follows:

First. The plaintiffs showed title in themselves derived from the government, appearing of record.

Second. At the time the defendants acquired their title to the land from which the timber was afterwards cut, a tax deed had been issued in due form by the county of Monroe, bearing date the 15th day of May, 1873, to one George Runkle, which had been duly recorded in the office of the register of deeds of said county; that for more than three years after the recording of said tax deed the said lands had remained wholly unoccupied; that the title which Runkle obtained by said tax deed had been duly conveyed, by a regular chain of title, from said Runkle to the defendants; and that under such title the defendants entered and cut said logs.

Third. That at the time the defendants acquired their said title they had no knowledge, actual or constructive, that said Runkle had within the three years next after the recording of his tax deed, and before he made a conveyance thereof to James F. Freeman in 1877, under and through whom the defendants obtained their title, released and conveyed all claim he had to said lands under and by virtue of said tax deed to the original owners of said lands, under whom the plaintiffs now claim title.

Fourth. That before the defendants cut and removed the

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timber mentioned in the complaint in this action, the plaintiffs, on the 26th of January, 1882, commenced an action against said defendants to recover damages for other timber cut and removed from said lands by the defendants before the commencement of said action, and in their complaint in said action they set out the fact that the said Runkle had in February, 1874, conveyed all his interest in said lands by virtue of his tax deed, to one L. E. Amidon, under whom the plaintiffs in said action claimed title to the lands in question. And the plaintiffs in said action further set out facts showing that the tax deed issued by said county of Monroe was void by reason of certain irregularities in the tax proceedings. To the complaint in such action the defendants answered, setting up title under said tax deed, and claiming to be purchasers in good faith of the apparent title of said Runkle. In said action it was held that the tax deed to Runkle was void for irregularities in the tax proceedings, and that, as Runkle had released all claim under said tax deed to the owners of the original title, the grantors of the plaintiffs, before said tax deed had been of record three years, the statute of limitations did not run in favor of said deed so as to make the same a valid title in the hands of his grantees subsequent to such release, though such grantees were purchasers without notice of such release. The judgment of the circuit court was affirmed by this court. See 63 Wis. 410.

Fifth. During the pendency of that action the timber in question in the present action was cut and removed by the defendants.

Upon these facts the learned circuit judge instructed the jury, among other things, on the question of the good faith of the defendants in cutting the logs in question, as follows: "Now, defendants were sued, and they had notice in that action, by the pleadings, of just exactly what the plaintiffs claimed. This action was commenced in January,

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1882. In the fall of 1882, or during the winter of 1882 or 1883, the defendants went onto that land for the purpose of taking off the rest of that timber, and at that time they had full and complete notice of all that the plaintiffs claimed. Now, can it be said that they entered in good faith? It was suggested by counsel that they had been in possession all the while. I don't think that position can be supported. They went on in the winter of 1881 and 1882, and committed a trespass, and went on again in the winter of 1882 and 1883, and committed another trespass; and at the time they went on in 1882 and 1883 they knew just exactly what the plaintiffs claimed. Now, did they come in good faith? Not under any definition of good faith that I know of. It could not be held that they did. They came on with notice. They came prepared to take the chances of their title at that time, and they did take their chance, and they must abide by it. The law is conclusive, under such circumstances, that if they cut that timber and failed to establish their title in the action, that they would be liable to pay the highest value of the lumber manufactured, and that they did it with their eyes wide open. They chose to take that chance, and they must abide by the chances they took. For these reasons, explained imperfectly as they are, I shall feel obliged to advise the jury that they must hold that the trespass was not in good faith, within the meaning of the law. . . . You have probably heard the statement I have just made to the attorneys in regard to my view of the law on this question of good faith. Now, I think that if you shall find the fact to be that, at the time when the defendants entered upon this land for the purpose of cutting and removing the timber, they knew that the plaintiffs claimed to own it, then they were not in good faith. They were bound, if they knew the plaintiffs owned it, to take notice of the plaintiffs' title just as it should prove to be upon the trial of that action."

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After the jury had been instructed, they returned into court and asked the court to further instruct them upon the question of good faith under the statute, and the learned judge further instructed them as follows: "This question of good faith. I was afraid, after I sent you out this morning, that I hadn't stated sufficient to you so that you would understand this question fully. I stated to you that if you were satisfied from the evidence that at the time when the defendants went upon this land and cut the timber which is in controversy in this action, *and they knew that the plaintiffs claimed to own it, that then they were not in good faith;* and, perhaps, I ought to say to you that there is no dispute on that question from the evidence. You ought not to have any trouble upon that question, gentlemen. The evidence is undisputed that there was an action pending by the plaintiffs against the defendants to determine the title to the land, commenced on the 27th day of January, 1882, and that this timber was cut in the winter of 1882 and 1883. There is no dispute about those facts; and if they cut this timber *when they knew the plaintiffs claimed it*, then they took their own chances of the title, and were not in good faith. They must abide by the chances they chose to take. That I think is the law, and that is the law which should govern you. If I am mistaken about it, the supreme court will correct me, but you follow the law as this court gives it." To these instructions the defendants duly excepted.

After a verdict for the plaintiffs, in which the jury found that the entry of the defendants upon the plaintiffs' land, and the cutting and removal of the timber therefrom, was not in good faith; that the actual damage sustained was $926; and that the highest market value of the lumber manufactured from such timber was $3,704,—on motion of the defendants for a new trial the learned circuit judge came to the conclusion that he had erred in instructing the

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jury as to what would constitute good faith under the statute, and made the following order in the action:

"The motion of the defendants for a new trial herein, or that judgment be entered on the verdict of the jury in favor of the plaintiffs for the smaller sum mentioned in said verdict, having been duly argued before the court, and the court being sufficiently advised in respect thereto, it is ordered that unless the plaintiffs elect to and do enter herein judgment upon said verdict for the lesser sum mentioned therein, with interest from April 1, 1883, pursuant to the statute, within thirty days after service upon the attorneys for the plaintiffs of a copy of this order, that then and in that event said verdict be set aside and a new trial of this action be granted, with costs to abide the event. And it is further ordered that this order be entered as of the 17th day of October, 1885, being the last day of the October term, 1885, of the said court in said county. And it is further ordered that plaintiffs' motion for judgment on the verdict for the value of the manufactured lumber — that is to say, the sum of $3,704 — be, and the same is hereby, denied."

From this order the plaintiffs appeal to this court.

The important question in this case is whether, at the time the defendants cut the timber in question, they were justified in believing they had a valid title to the lands upon which it was standing. It seems to us that it cannot be argued with any degree of plausibility that the defendants could have in good faith acquired a title to said lands, within the meaning of said ch. 239, Laws of 1882, if, at the time they purchased such title, they had knowledge of all the facts which as a matter of law rendered their supposed title invalid. Without holding that in order to acquire in good faith a title to land, within the meaning of said act, it is necessary that the defendant should have acquired it under such circumstances as would render him a *bona fide*

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purchaser without notice of another outstanding and better title, we think it must be held that when, at the time of his purchase, he has knowledge of all the facts which show the invalidity of his title and the fact that a better title exists in another, he cannot be said to have in good faith acquired such title. In a case of that kind there is no mistake of fact or any want of knowledge of facts upon which to base his good faith. And the good faith, if there be any, is based upon a question of law applicable to the facts. The mistake, if there be one, is a mistake of the law and not of fact. The general rule is that parties must be conclusively held to know what the law is, and a mistake as to what the law is upon a certain state of facts is no defense either in a civil or criminal action. We do not think the legislature intended to abrogate this well-established rule in order to screen trespassers from responding in the larger damages given by the other provisions of said sec. 4269, R. S. If a defendant, with a full knowledge of all the facts which the law says renders his title invalid, can insist that he believed it to be a good title and acquired it in good faith, because he was so advised by counsel, there would be but a slight chance for the owner of standing timber to protect himself against the trespasser.

Under the law as it stood before the amendment of 1882, this court never held that the defendant could excuse himself from responding in the larger damages because he made a mistake as to his title, and in some of the cases it is strongly intimated that such mistake was not a mistake within the meaning of the law. The following cases, involving, to some extent, the construction to be given to said sec. 4269, R. S., have been decided in this court: *Webster v. Moe*, 35 Wis. 79; *Brewster v. Carmichael*, 39 Wis. 456; *Webber v. Quaw*, 46 Wis. 122; *Wright v. E. E. Bolles Wooden Ware Co.* 50 Wis. 169, 171; *Haseltine v. Mosher*, 51 Wis. 443; *Tuttle v. Wilson*, 52 Wis. 643; *Smith v. Sherry*,

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54 Wis. 114, 130; *Schweitzer v. Connor*, 57 Wis. 177; *Brown v. Bosworth*, 58 Wis. 379; *Warren v. Putnam*, 63 Wis. 418, 419; *Smith v. Morgan*, *ante*, p. 358. In the last case it was held that a defendant who held an unforfeited school-land certificate could not avail himself of the proviso to said sec. 4269, as amended, for the reason that upon the face of the certificate he was forbidden to cut such timber, and that it could make no difference that the defendant supposed he had a right to remove the timber, and so testified upon the trial.

We have no reason for thinking that the legislature intended to provide for such a mistake by the amendment of 1882. Had such been the intention of the legislature, it seems to us that other language would have been used to express such intention. Under the rule above stated it may be that when the defendants acquired their title to said lands, they acquired it in good faith, and entered on the land believing such title to be valid; and, had they cut and removed the timber before acquiring any other knowledge as to the validity of their title, they may have brought themselves within the statute. But the statute says the timber must be cut under like circumstances. We do not think it a protection to the defendant that he acquired his title in good faith, believing it to be valid, if after acquiring such title, and before he cuts and removes the timber, he is fully informed of the invalidity of his title. After he receives such information he can no longer claim title to the land in good faith; and if thereafter he strips the land, he must do so at the risk of establishing his title, or pay the larger damages. It is perhaps difficult to determine with precision what was meant by the act of 1882; but we think we are not running across either the meaning of the language used or the intention of the legislature, by holding that a defendant in an action brought under said sec. 4269, R. S., as amended, is not protected by the

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proviso added in 1882, when he purchases a title with full knowledge of the facts which render it invalid, or when, after making his purchase and before committing the trespass, he is informed of such facts. When the facts are all known, and the party rests his legal rights upon the law applicable to such facts, he does not invoke the protection of the statute, which gives him the benefits of a purchaser in good faith without notice of the title of the other claimant, but he asserts as a matter of law that both the right and the title are with him.

In this view of the case it is clear the learned circuit judge was mistaken in his construction of the statute upon the motion for a new trial, and that he erred in setting aside the verdict for the reasons stated in his opinion upon such motion. We are, however, of the opinion that the learned circuit judge erred in his charge to the jury when they returned into court and requested further instruction as to what was necessary to constitute good faith under the statute. It will be seen, by an examination of the instructions then given to the jury, that they were told, in substance, that if, at the time the defendants cut the timber, they knew that the *plaintiffs claimed to own the lands*, then the defendants could not be said to have cut the timber in good faith, believing that they had title to the lands. This instruction was stronger in favor of the plaintiffs than was given in his original charge, and may have induced the jury to render the verdict they did upon this question. We do not think a mere notice to the defendant that the plaintiff claims to own the lands in controversy is sufficient to prevent a defendant from availing himself of the provisions of the statute. He must have notice of the facts upon which the plaintiff's claim of title is based, and of the facts which render the defendant's title invalid. It may be that there was sufficient evidence in the case to have justified the jury in finding that the defendants had knowledge of

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all the facts which rendered their title invalid and affirmed the title of the plaintiffs, before the trespass was committed; but, under the instructions of the learned judge, the jury were not called upon to pass upon that question.

The instructions given to the jury as above stated were duly excepted to by the defendants, and for this reason a new trial was properly granted in the case. The condition upon which the order granting a new trial was made, is one which the plaintiffs may accept or refuse in their discretion, and they cannot be said to be injured by it.

By the Court.— The order of the circuit court is affirmed, and the cause is remanded for a new trial, unless the plaintiffs shall elect to take judgment for the sum specified in the order granting the new trial.

VOELZ, Appellant, vs. BREITENFIELD, Respondent.

March 5 — March 22, 1887.

FENCES. *(1) Rebuilding partition fence: Service of notice of appraisement. (2) Certificate of fence viewers of expense. (3) Penal statute: Strict compliance.*

1. Notice of the meeting of the fence viewers to examine a fence and ascertain the expense thereof, under sec. 1397, R. S., must be served upon the owner or occupant of the land in the same way that the notice required by sec. 1393 must be served, i. e. as a summons is served in a civil action before a justice of the peace. If not so served the proceedings of the fence viewers are without jurisdiction.
2. Under sec. 1397, R. S., requiring the certificate of the fence viewers to state the "amount of the *expense* of such building," etc., a certificate stating only that the "*value* of such rebuilding is $33," is void.
3. Sec. 1397, R. S., is a highly penal statute, and its provisions must be strictly complied with.

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APPEAL from the Circuit Court for *Monroe* County.

Action under sec. 1397, R. S., to recover double the expense of rebuilding a partition fence. The facts will sufficiently appear from the opinion. The cause was tried by the court without a jury, and the court, after filing its findings of fact and conclusions of law, rendered judgment dismissing the complaint with costs. The plaintiff appealed.

For the appellant there was a brief by *Morrow & Masters*, and oral argument by *Mr. Morrow.*

For the respondent there was a brief by *Bleekman, Tourtellotte & Bloomingdale*, and oral argument by *Mr. Bleekman.* To the point that there must be a strict compliance with the statute they cited, besides cases cited in the opinion: *Babb v. Carver*, 7 Wis. 124, 127; *Austin v. Allen*, 6 id. 134; *Sherwood v. Reade*, 7 Hill, 431; Cooley's Const. Lim. 61; Potter's Dwar. Stat. 224; Sedgwick on Stat. & Const. Law, 351; *McGahen v. Carr*, 6 Iowa, 331; *Kellogg v. McLaughlin*, 8 Ohio, 115.

ORTON, J. The appellant made application to two fence viewers of the town where the adjoining lands owned by him and the respondent in severalty and occupied by them in common are situated, to divide the line between them, with a view of having a partition fence upon said line built or repaired and having the share of each of said parties duly assigned. The record is silent as to whether a proper notice, lawfully served, was given of this application to the respondent. The fence viewers divided said line fence according to the application, and ordered each of said parties to build or repair their respective shares of said fence by a certain fixed time. The respondent failed to so build or repair his share of said fence within said time, and the appellant built or repaired the same. The appellant thereupon "called upon two fence viewers of said town" to examine said fence so built by him for the respondent, and

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ascertain the expense thereof, and said fence viewers did so examine said fence, and adjudged it sufficient, and ascertained the expense thereof, and gave the appellant and respondent each a *certificate* under their hands of such decision, and of the amount of the expense of such building or repairing, etc. The defect of this certificate complained of is that it certified to the *value*, instead of the *expense*, of such building or rebuilding.

Subd. 3, sec. 1393, R. S., requires a notice to be given by the fence viewers to each party of the first application to them to partition or divide said line fence, "*to be served as a summons is in a civil action before a justice of the peace.*" By sec. 1397, R. S., the appellant was authorized, in such a case, to call upon two or more fence viewers of the town, and they were required to examine such fence, and ascertain the expense thereof, "*after having given notice to such adjoining owner or occupant as provided in section 1393.*" This last notice was served by one of the fence viewers, and not by a constable or other officer authorized to serve a summons in a civil action before a justice of the peace.

This action was brought by the appellant against the respondent, under the authority of said sec. 1397, which gives the plaintiff the right to demand of the defendant double the amount of such ascertained expense, together with the fees of the fence viewers; and, if he shall neglect or refuse to pay the same within one month, to recover the same, with interest at the rate of one per cent. per month and costs, and the defendant's adjoining land is liable to seizure and sale upon the judgment so recovered, without exemption. After the findings of the several facts, the circuit court found, as a conclusion of law, that the certificate was not a proper or sufficient certificate of such expense upon which to base the action, and dismissed the action presumably for that reason.

This statute is a special one and highly penal, and pro-

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ceedings under it must strictly comply with its provisions. *Eldred v. Leahy*, 31 Wis. 546; *Canfield v. Smith*, 34 Wis. 381; *Cohn v. Neeves*, 40 Wis. 393; *State v. Castle*, 44 Wis. 670; *Potts v. Cooley*, 51 Wis. 353, and other cases cited in respondent's brief. The first and perhaps the most fatal defect in these proceedings was the want of any legal notice to the respondent of the meeting or action of the fence viewers to adjudge the sufficiency of the fence and to ascertain the expense thereof, precedent to their certificate as the foundation of the action against him for double the amount thereof. The notice was served by one of the fence viewers by leaving a copy thereof with the respondent's wife, and no other service was made. The statute is too plainly and carefully drawn to admit of any mistake by any one competent to act under it. Subd. 3, sec. 1398 requires the first notice of the fence viewers "to be served as a summons is in a civil action before a justice of the peace." A summons in a civil action before a justice of the peace must be served (1) *by a proper officer*, as by a sheriff or a constable of the proper county. Secs. 3594, 3595, R. S. If such an officer cannot be obtained for such purpose, the justice may empower any suitable person not a party to execute the same. Sec. 3608, R. S. (2) In a particular *manner*, as "by reading the same to the defendant, and delivering a copy thereof to him when demanded, if he be found, and, if not found, by leaving a copy thereof at his usual place of abode in the presence of some one of his family of suitable age and discretion, who shall be informed of its contents," etc. This is plain enough to any one who can read. This is the only way such notice can be served; and if not served in this way it is no service at all and no jurisdiction in such a proceeding is obtained. The service of the notice above stated, by one of the fence viewers, precedent to the adjudication of the sufficiency of the fence and the ascertainment of the expense thereof, was

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made to comply with the provisions of sec. 1397, R. S. The language of that section, in respect to the service of such notice, is, "after having given notice to such adjoining owner or occupant *as provided in section* 1393." There can be no doubt about the meaning of this provision. It is precisely the same as if the language of sec. 1393, in respect to such service, had been repeated. The service of both notices must be precisely the same. The service of the first, "as a summons in a civil action before a justice of the peace," was necessary to give the fence viewers jurisdiction of the proceeding in the first place; and the service of the last notice in precisely the same manner was as necessary to give the fence viewers jurisdiction to adjudicate upon the sufficiency of the fence and the expense thereof. There was no such service of this notice, and therefore such adjudication and the certificate thereof were without jurisdiction, *coram non judice*, and void.

That service of a summons in a civil action before a justice of the peace by a constable or sheriff is essential and necessary, is very clearly shown by an amendment of sec. 3608, R. S., by ch. 261, Laws of 1883, which requires, in case property is seized under it, the person empowered to make the service, other than such an officer, within twenty-four hours, or as soon thereafter as may be, to deliver to some sheriff, under-sheriff, deputy-sheriff, or constable of the county, the property so seized, together with the process under which such seizure was made. It is very important, where property or property rights are involved, that the jurisdiction process and its due and proper service and a return thereof should be made matters of permanent record under official sanction. It is especially so under this proceeding, where a man's possession is invaded and a fence built upon his line by another without his consent, and he is made to pay double the expense thereof, with all the costs

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of the proceeding, and his land is seized and sold therefor without the benefit of exemption as a homestead. This provision as to the service of the notice is new. Formerly the statute only required "notice to be given" in the first place, and the subsequent adjudication was without any notice. Tay. Stats. ch. 17, secs. 3, 4. The revisers' notes to this chapter of the Revised Statutes show the importance of this proceeding, and the necessity of making it strictly a matter of record like other adjudications involving property rights and penal sanctions. The adjudication and the certificate on which this action is predicated are void, and the action for that reason was properly dismissed.

We think, also, that the conclusion of law that the certificate itself of the amount of the expense of building such fence is insufficient, was correctly found. The statute (sec. 1397, R. S.) requires such certificate to state "the amount of the *expense* of such building," etc. The certificate in evidence states only that the "*value* of such rebuilding is $33," etc. This is a gross and material departure from the statute, which renders the certificate void on its face or *ipso facto*. The learned counsel of the appellant contends that the *value* is virtually the same as expense, or, if different, such word more nearly expresses the sense and intention of the provision, and that the *expense* might be incurred for an unreasonably costly and extravagantly ornamental fence, such as would be appropriate as an inclosure of a city or village lot or of the grounds about a costly mansion. By reference to the revisers' notes, it will be seen that the changes made in these provisions were intended to limit and define what should be a lawful fence, to avoid this objection. But it is sufficient that *value* is not the word used in the statute, and it is clear enough that the two words are very materially different in meaning. It is most surprising that public officers charged with the execution of such im-

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portant statutory provisions, made as plain and intelligible as the English language could make them, should be guilty of such gross omissions and mistakes.

By the Court.— The judgment of the circuit court is affirmed.

FUHRMAN, Respondent, vs. JONES and another, Appellants.

March 5 — March 22, 1885.

Debtor and creditor: Voluntary assignment: Attachment: Attorney acting as court commissioner.

1. Until the bond of the assignee, with an indorsement thereon by the county judge or court commissioner taking the same, showing that he is satisfied as to the sufficiency of the sureties, has been filed in the office of the clerk of the circuit court, together with a true copy of the assignment with the indorsement by the assignee and certificate by the judge or court commissioner as required by sec. 1696, R. S., the assignee has no right to the property attempted to be assigned as against attaching creditors.
2. Whether the attorney for the assignor or assignee is competent to act as a court commissioner in making the indorsements and certificate required by secs. 1694-96, R. S., not determined.

APPEAL from the Circuit Court for *Monroe* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

It appears from the record that a few days prior to January 7, 1886, Moritz Paley, of Tomah, being insolvent, counseled with S. W. Button, an attorney at law and a circuit court commissioner of that place, in regard to making an assignment for the benefit of creditors. On the day named, Button drew the assignment to the plaintiff and his bond at the request of Paley; and January 8, 1886, they were both signed in the presence of Button, and at the same time the assignment was acknowledged before him, and the sureties to

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the bond justified before him as such commissioner, and thereupon they were both delivered by said commissioner to the plaintiff, who thereupon took a copy of said assignment and said bond to Sparta, and there, in the presence of the clerk of the circuit court, indorsed upon said copy his certificate of its being a true and correct copy and that he thereby took upon himself the faithful discharge of the several trusts specified in the original assignment; and such copy and bond were on the same day filed with said clerk at 7 P. M.; that said clerk at the same time certified thereon to the correctness of said copy, and to such indorsement by the plaintiff of his consent in his presence; that thereupon and on January 9, 1886, the plaintiff took possession of the goods covered by the assignment, and employed said Button as his attorney in discharging his duties under said assignment; that afterwards, and on January 18, 1886, said Button, as such commissioner, in the presence of said clerk, indorsed upon said bond then on file with said clerk his certificate, reciting, in effect, that he was not a creditor of said Paley; that from the affidavits of the sureties in the bond he was satisfied that the property of said sureties within the state was worth in the aggregate the sum of $1,300 specified therein; that afterwards, and on February 17, 1886, said Button signed said certificate so made by the said clerk, and made the necessary interlineations to show that the same was done by him as such court commissioner at said last-named date; that January 11 and 12, 1886, the defendants, as sheriff and deputy-sheriff, seized the goods so assigned and then in the possession of the plaintiff, on two several attachments upon two several claims against said Paley; that said Button appeared as attorney on the part of the defense in each of said attachment suits, for the purpose of traversing the same; that such proceedings were had in each of said suits, that January 29, 1886, judgment was entered in each against Paley for the respective amounts of

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$134.54 and $217.03; that thereupon executions were issued upon said judgments respectively, and placed in the hands of said sheriff, and the same were thereupon levied upon said goods by said sheriff and deputy sheriff, and the same were duly sold thereon at sheriff's sale, and the proceeds thereof applied in payment of said judgments and costs; that thereupon the plaintiff, by said Button as his attorney, commenced this action for the wrongful taking and unlawful conversion of said goods so assigned.

The defendants justified under said attachments, judgments, executions and sale. On the trial of the cause (a jury having been waived) the court found as facts that all the material allegations of the complaint were true; that the plaintiff had sustained damage by reason of such taking and conversion in the sum of $450; and, as conclusions of law, the court found that the plaintiff was entitled to judgment against the defendants for that amount, with costs. From the judgment entered accordingly the defendants appeal.

For the appellants there was a brief by *Morrow & Masters*, and oral argument by *Mr. Morrow.*

For the respondent the cause was submitted on the brief of *S. W. Button.*

CASSODAY, J. The plaintiff's right to maintain this action depends entirely upon the question whether the assignment was completed, so as to vest the title to the goods in question in the plaintiff as against the creditors of his assignor, prior to the time when they were seized by the defendants on the attachments. The statutes make every voluntary assignment or transfer of property for the benefit of or in trust for creditors void as against the creditors of the person making the same, unless completed as therein prescribed. Secs. 1694–1696, R. S. *Before* taking possession of the property assigned or assuming any trust under the

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assignment, the assignee must deliver to the county judge or court commissioner, not being a creditor of such assignor, a bond, duly executed to the clerk, in a sum not less than the whole amount of the nominal value of the assets, to be ascertained by the oath of one or more witnesses and of the assignor, with two or more sufficient sureties, freeholders of the state, who shall each testify to his responsibility, and by their several affidavits *satisfy the officer taking such bond* — that is to say, such county judge or court commissioner — that the property of such sureties within this state is worth in the aggregate the sum specified therein. Sec. 1694. The county judge or court commissioner, as an officer of the law, is to be thus satisfied of the sufficiency of the sureties. This should appear in writing upon the bond itself. Here no such indorsement was made by the commissioner until January 18, 1886, ten days after the filing of the bond, and five days after the last attachment.

Before delivering the copy of such assignment to the county judge or court commissioner for the purpose specified in sec. 1695, the assignee must, *in the presence of the officer taking such bond*, indorse in writing on such copy his consent to take upon himself the faithful discharge of the several trusts specified in the assignment, and that the said copy so indorsed by him is a true and correct copy of the original. Sec. 1696. The object of having such indorsement by the assignee *in the presence* of such county judge or court commissioner is to secure such action in good faith under official sanction. There was nothing connected with such copy here showing that such indorsement was made in such presence until more than five weeks after the attachments. The fact of such presence resting in parol during that time did not satisfy the statute. Accordingly it is provided that such officer — that is to say, such county judge or court commissioner — must indorse upon such copy of the assignment his certificate that the same is a true copy

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of the original and of the whole thereof, and that such assignee named in such original assignment did in his presence make the indorsement thereon as thus required. Sec. 1696. No such indorsement was made by such officer here until more than five weeks after the seizure of the goods on the attachment, and forty days after the copy was filed with the clerk. Such bond, immediately after its execution, together with a full and true copy of such assignment, must be filed by the officer taking the same — that is to say, such county judge or court commissioner — in the office of the clerk of the circuit court to whom it is executed. Sec. 1695. This requirement is to preserve the bond in official custody continuously from the time of its execution, for the benefit of all concerned. Such bond and copy of assignment must be *kept* by such clerk in his office, subject at all times to the inspection of all parties interested. *Ibid.* Such bond and copy of assignment so to be "kept" by the clerk must be completed with such several indorsements and certificate thereon before delivery to such clerk for such keeping. Until the assignment and such completed copy and bond are so filed with the clerk, the assignee has no right to the property attempted to be assigned, as against the attaching creditors of the assignor. Such is the effect of the repeated decisions of this court. *Scott v. Seaver*, 52 Wis. 175; *Wadleigh v. Merkle*, 57 Wis. 517.

This renders it unnecessary to determine whether an attorney for an assignor or assignee, who happens to be the court commissioner who drew the assignment, is competent to make such indorsements and certificate; but the impropriety of acting in such double and inconsistent capacities must be apparent. It is plainly distinguishable from *Hammel v. Schuster*, 65 Wis. 669.

Of course, the defendants were only entitled to retain a sufficient amount of the proceeds of the sale of the property to satisfy the executions in their hands, and costs. Although

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the trial was by the court, yet, as it does not appear definitely whether they received more or less, the judgment of the circuit court is reversed, and the cause is remanded for further proceeding according to law.

By the Court.— Ordered accordingly.

THE STATE EX REL. SMITH, Appellant, vs. THE BOARD OF SUPERVISORS AND TOWN CLERK OF THE TOWN OF LEON, Respondents.

March 5 — March 22, 1887.

Ditches and drains: Preservation of highways: Appointment of appraisers: Claim for damages.

1. The supervisors have no power to appoint appraisers under sec. 1237, R. S., except upon application by the owner or occupant of the land entered upon or used.
2. A claim for damages filed by such owner or occupant with the town clerk in order that it might be laid before the board of audit, cannot be construed as an application for the appointment of appraisers.

APPEAL from the Circuit Court for *Monroe* County.

Upon the petition of the relator an alternative writ of *mandamus* was issued, commanding the defendants to appoint electors, under sec. 1237, R. S., to appraise the damages done upon his lands by the construction of a ditch for the preservation of a highway. The circuit court overruled a motion to quash the alternative writ, and, on appeal, its order was affirmed. See 66 Wis. 199. The defendants then made return to the writ to the effect that appraisers had already been appointed and acted, and that the amount of the damages allowed by them had been audited by the town board and tendered to the relator. Upon the trial of the issue the court found the facts to be as stated in

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the return, and that the relator was therefore not entitled to a peremptory writ. From the judgment entered accordingly this appeal is taken.

For the appellant there was a brief by *Morrow & Masters*, and oral argument by *Mr. Morrow.*

For the respondents there was a brief by *Dickinson & Graham*, and oral argument by *Mr. Dickinson.*

COLE, C. J. In the return to the alternative writ, the supervisors allege and state that, on due application made by the relator therefor, appraisers were appointed to appraise the damages sustained by the relator by reason of digging the ditch in question, and that such appraisers, in pursuance of their appointment, assessed the damages, and the amount was subsequently audited, and the sum tendered to the relator, which he refused to accept. If the evidence sustains this return, a good and sufficient excuse is shown for not awarding a peremptory writ to appoint other appraisers. On the trial of the issue joined on the return, the circuit court found that an appointment of appraisers had been made, and damages assessed, as set forth in the return. The question to be determined is whether the evidence sustains this finding.

The statute under which this proceeding is taken provides, in effect, that if any owner of land which is entered upon for the purpose of constructing a ditch for the preservation of a highway, shall feel himself aggrieved, "he may apply to the supervisors of the town, who shall appoint three disinterested electors of such town to appraise the damages." Sec. 1237, R. S. This application is jurisdictional, and without it the supervisors have no power to act in the premises. Was such an application made in this case?

It is insisted that the paper writing appearing in evidence, signed by the relator, dated March 11, 1882, is such an application, and fully justified the action of the board upon

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it.[1] That is a statement of the claim of the relator for the damages, which he made to be filed with the town clerk in order that it might be laid before the board of audit. It was plainly not intended to be an application for the appointment of appraisers, and should not be so regarded. It was the regular and proper way of getting the claim before the board of audit to be examined, and of ultimately bringing it before the town meeting for adjustment, pursuant to secs. 821, 822, 824, R. S. On referring to these provisions, it will be seen that it was the duty of the board of audit to examine into the character and circumstances of any claim against the town which they were not authorized to audit, and to report upon the same to the next ensuing town meeting. The qualified electors at the town meeting have ample authority to compromise and settle any controversy existing against the town, and to provide the means for its payment. Subd. 5, sec. 776. The claim as presented was

[1] The claim filed by the relator with the town clerk, and the endorsement thereon by such clerk, are as follows:

"*The Town of Leon, Monroe County, Wisconsin, to Robert Smith, Dr.*

"To damage sustained by reason of a ditch or trench dug and made by order or direction of the board of supervisors of said town, across lands owned by A. F. Smith, in said town, thereby turning the stream or water of the Little La Crosse river from its natural and usual channel and course, in such manner as to wash upon and otherwise damage the lands of said *Robert Smith*, and to injure and destroy his property, real and personal, by reason of such ditch or trench and the flow of water occasioned thereby; and that said *Robert Smith* has and will sustain damage thereby and therefrom, in the sum of one thousand five hundred dollars ($1,500). That the lands upon which said ditch or trench are upon is on section eleven (11), in said town of Leon, and said *Robert Smith's* land is on sections 9, 10 and 11 in said town.

"And this statement of claim is made to be filed with the town clerk of said town to be laid before the board of audit.

"Dated March 11th, 1882. ROBERT SMITH.

"Received and filed this 11th day of March, at 6:15 P. M., 1882.

"M. D. L. MOORE.

"$1,500. Not allowed."

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for $1,500, which was marked "not allowed." It does not appear that the board ever made any report upon this claim to any town meeting; but the paper was acted upon as though it amounted to an application for the appointment of appraisers under the statute. It is difficult to understand how such an interpretation could have been placed upon the writing; for there is not an intimation or word in it that the relator desired the supervisors to appoint appraisers to assess damages. And while, as Mr. Fox says, the supervisors took the writing as the basis for the appointment of appraisers, yet this was wholly unwarranted by the obvious meaning and object of the writing itself.

The validity of the action of the appraisers depended, of course, upon their proper appointment; and the supervisors had no power to appoint except upon an application therefor by the aggrieved party. If the supervisors acted without such application, the proceeding would have no validity and would bind no one. It follows from these views that the judgment of the circuit court must be reversed, and the cause remanded with directions to award the peremptory writ.

By the Court.— It is so ordered.

EMERY, Administrator, etc., Respondent, vs. FUGINA and others, Appellants.

March 5 — March 22, 1887.

Landlord and tenant: Growing crops.

If there was no reservation in the lease, the lessee of a farm is entitled to a crop of wheat growing upon it at the time of executing the lease, and which matured during the term.

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APPEAL from the Circuit Court for *Trempealeau* County.

This is an action of trover to recover the value of 150 bushels of winter wheat, of the alleged value of $150. The taking and conversion of the wheat by the defendants, and the value thereof, is not controverted. Each party claims to own the wheat, and this is the only controversy in the case.

The wheat was raised on the farm of one Paul Pampauch, and was harvested in July, 1881. On April 19 of that year, Pampauch, who was indebted to the plaintiff's intestate, executed to her an instrument in writing of that date, purporting to be a lease of such farm for eight months from the date of such instrument, at the rent of $125, the receipt whereof was therein acknowledged by the lessor. The instrument is in the usual form of a lease, and contains no reservation by the lessor of any right or interest in the leased premises, or the crop growing thereon, during such term. The plaintiff claims the wheat in controversy under this lease to his intestate of the land upon which it was growing when the lease was executed.

On July 25, 1881, Pampauch executed a chattel mortgage to the defendants on the same wheat, to secure his indebtedness to them, and such mortgage was duly filed in the proper town clerk's office on the same day. The wheat had been cut, and was standing in the shock, when the mortgage was executed and filed. The defendants claim the property under this mortgage, and are entitled to hold it unless the plaintiff's intestate obtained a paramount title thereto under the aforesaid instrument of April 19th. The defendants introduced testimony on the trial tending to prove that the farm and wheat remained in the possession of Pampauch during the term of the lease or instrument of April 19th, and that such instrument, although in form a lease, was in fact merely a security for money, and claimed that because it was not filed as a chattel mortgage it was void as against them.

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The court submitted but a single question to the jury, which is as follows: "Was the instrument under which the plaintiff claims title to the winter wheat described in the complaint, intended as a lease or as a security for the debt of Paul Pampauch?" The jury answered, "It is a lease." Each party moved for judgment on the verdict. The motion of the defendants was overruled, as was also their motion, made subsequently, for a new trial. The motion of the plaintiff was granted, and judgment for the value of the wheat entered in his favor. The defendants appeal from the judgment.

E. C. Higbee, for the appellant.

For the respondent the cause was submitted on the brief of *Sam. S. Miller*. To the point that the title to the crop passed under the lease, he cited *Wintermute v. Light*, 46 Barb. 278; *Hadley v. Barton*, 47 How. Pr. 481; *McLean v. Bovee*, 24 Wis. 295.

LYON, J. In many respects this case is similar to that of *Lamson v. Moffat*, 61 Wis. 153, on the authority of which, doubtless, the question of the intention of the parties in executing the instrument of April 19, 1881, was submitted to the jury. The evidence is sufficient to support the special finding that such instrument, under which the plaintiff claims title to the wheat, is what on its face it purports to be, a lease, and hence not a mere security for a debt. Being a lease, there can be no doubt, we think, that the crop of wheat growing upon the leased premises when the instrument was executed, and which matured during the term of the lease, became the property of the lessee,— the same not having been reserved by the lessor. This must necessarily result from the rules of law that the tenant is vested with all the rights incident to possession, and the use and enjoyment of all the privileges appurtenant to the leased premises, and may maintain an action against any person who

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disturbs his possession or trespasses upon the premises, even though it be the landlord. The latter has no right to enter, during the term, to repair or to remove crops, unless he has stipulated with the lessee for such right. See Tayl. Landl. & Ten. § 178; *Hisey v. Troutman*, 84 Ind. 115. Had the question related to the crop of grass growing upon the premises when the lease was executed, no one would contend that it did not pass by the lease to the lessee, who might lawfully pasture his cattle upon it or harvest it for his own use. The fact that the crop is wheat instead of grass cannot change the rule.

The case was tried throughout by both parties on the theory that if the instrument of April 19th was a lease, the plaintiff must recover. The plaintiff having succeeded in establishing it a lease, if that theory be adhered to the judgment should not be disturbed. Yet a point has been raised and argued in this court by counsel for defendants outside this theory, which will now be noticed.

The plaintiff, on his direct examination, testified that, as agent of his intestate in her life-time and at the time the lease was executed, he employed Pampauch to put in the crops on the leased premises. On his cross-examination he further testified that the agreement was that if Pampauch did the work faithfully he was to receive one fourth of the crops for his services. On redirect examination he stated that Pampauch was to receive one fourth *the value* of the crops for such services. On this testimony counsel maintains that Pampauch was tenant in common of the crop with plaintiff's intestate, owning an undivided one fourth thereof, and hence, if the plaintiff can recover in the action, the recovery should be limited to the value of three fourths of the wheat in controversy.

It is very doubtful, to say the least, whether the wheat then growing on the farm was included in this contract, conceding it to be as stated in such cross-examination. That con-

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tract seems to be limited to crops put in after the execution of the lease. But, however that may be, the fair interpretation of the whole testimony is that the terms of the contract were as stated and explained by the plaintiff on his redirect examination, which negatives the claim that Pampauch retained any interest in the wheat in controversy. Pampauch was a witness in the case, his deposition having been read on the trial in behalf of the defendants. He denied that the plaintiff's intestate had any interest in the winter wheat under her lease, and testified that after she was paid the balance of the proceeds of the farm was to belong to him. His testimony was most favorable to the defendants, and was submitted to the jury on the question of the character of the instrument of April 19th. No point seems to have been made on the trial to the effect that, even if such instrument was a lease, still Pampauch had an interest in the wheat in controversy. No instructions or questions were proposed with reference to any such view; but, on the contrary, the court and both parties acted throughout upon the hypothesis that if the jury should determine the instrument to be a lease the plaintiff should recover for all of the wheat taken and converted by the defendants. We are satisfied that such hypothesis is fully sustained by the proofs. Were its accuracy more doubtful than it is, or even were it inaccurate, we should hesitate, under the circumstances above stated, to disturb the judgment for that reason.

By the Court.—The judgment of the circuit court is affirmed.

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CAYON, Respondent, vs. THE DWELLING HOUSE INSURANCE COMPANY OF BOSTON, MASS., Appellant.

March 7 — March 22, 1887.

INSURANCE AGAINST FIRE. *(1) Total loss: When over-estimate immaterial. (2) Evidence admitted for specific purpose. (3) Pleading: Affirmative defense. (4) Mortgage: Insurable interest. (5) Notary public not a "magistrate." (6) Proofs of loss: Waiver of defects.*

1. Under sec. 1943, R. S., providing that the amount of insurance written in the policy on the real property destroyed "shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed," the fact that the loss was "knowingly and intentionally" stated by the plaintiff to be greater than it actually was, is immaterial and constitutes no defense to an action on the policy.
2. Evidence admitted for a specific purpose only cannot be used for any other purpose in the case.
3. That the assured fraudulently concealed the existence of a mortgage on the premises insured is an affirmative defense which should be pleaded.
4. *It seems* that in this state a mortgagor is the absolute owner of the mortgaged premises, and has an insurable interest therein to the extent of their value, notwithstanding the mortgage.
5. A notary public is not a "magistrate," within the meaning of a policy of insurance requiring proofs of loss to be accompanied by a "certificate of a magistrate nearest the place of fire."
6. Proofs of loss, otherwise proper, were accompanied by a certificate signed by a notary public instead of by a magistrate, as required by the policy. *Held*, that the retention of such proofs by the company without objection until the trial of an action on the policy, constituted a waiver of the defect.

APPEAL from the Circuit Court for *Brown* County.

Action upon a policy of insurance against fire. The facts will sufficiently appear from the opinion. The defendant appealed from a judgment in favor of the plaintiff.

For the appellant there was a brief signed by *Ellis, Greene & Merrill*, and oral argument by *Mr. Greene*. They con-

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tended, *inter alia*, that the misrepresentation, in the proofs, of the amount of loss and damage defeated any claim under the policy. The policy provides that the proofs must state "the amount of loss and damage," and that "any misrepresentation in the proofs . . . as to loss or damage shall forfeit all claims under this policy." Sec. 1943, R. S., conclusively fixes the amount of the insurance as the measure of damages, but a contract against misrepresentation is still competent and material; for the insurer is entitled to know the value and damage for *other purposes* than determining the *amount* he must pay if liable. The fact that the loss is much more than the insurance is convincing that the claim is just and fair, and tends to influence the insurer to settle promptly and without investigation. See *Sleeper v. N. H. F. Ins. Co.* 56 N. H. 401; *Leech v. R. F. Ins. Co.* 58 id. 245; *Claflin v. Comm. Ins. Co.* 110 U. S. 81–97; *Dogge v. N. W. Nat. Ins. Co.* 49 Wis. 501. The intentional over-valuation must be conclusively presumed to have been fraudulent, and the finding to the contrary must be rejected. *Mullin v. Vt. M. F. Ins. Co.* 58 Vt. 113. The distinction is between innocent mistake and wilful perjury; not between wilful perjury which is and that which is not fraudulent. *Parker v. Amazon Ins. Co.* 34 Wis. 371. See, also, *Leib v. Internat. Ins. Co.* 1 Dil. (U. S. C. C.), 443; *Wall v. Howard Ins. Co.* 51 Me. 32; *Security Ins. Co. v. Fay*, 22 Mich. 467; *Security Ins. Co. v. Bronger*, 6 Bush, 146; *Catron v. Tenn. Ins. Co.* 6 Humph. 176; *Haigh v. De la Cour*, 3 Campb. 319; *Dickson v. E. F. Ins. Co.* 18 U. C. Q. B. 246. The policy contracts against "any misrepresentation in the proofs," and such misrepresentation need not be fraudulent. *Burritt v. S. C. M. F. Ins. Co.* 5 Hill, 193; *Davenport v. N. E. M. F. Ins. Co.* 6 Cush. 340; May on Ins. sec. 217; *Lewis v. Eagle Ins. Co.* 10 Gray, 508; *Gould v. York Co. M. F. Ins. Co.* 47 Me. 409; *Carpenter v. American Ins. Co.* 1 Story C. C. 57; *Carter v. Boehm*, 3 Burr.

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1909; *Cont. Ins. Co. v. Kasey*, 25 Gratt. 268. Nor need it be proved material, for the contract makes it material. *Graham v. Fireman's Ins. Co.* 87 N. Y. 91; *Thomas v. Fame Ins. Co.* 108 Ill. 91; *Jeffries v. Life Ins. Co.* 22 Wall. 47; *Campbell v. N. E. Mut. L. Ins. Co.* 98 Mass. 381; *Miller v. Mut. B. L. Ins. Co.* 31 Iowa, 216. These are cases relating to the risk, but it can make no difference whether the misrepresentation occurs in the proofs or the application, if it relates to matters which the insurer has a right to know. *Blakeley v. Phœnix Ins. Co.* 20 Wis. 206; *Claflin v. Comm. Ins. Co.* 110 U. S. 81; *Security Ins. Co. v. Bronger*, 6 Bush, 146. The court erred in refusing to submit to the jury the question proposed by defendant as to whether the misrepresentation was made to induce prompt settlement without investigation.

The plaintiff did not state in his proof the existence or value of the incumbrance on the insured property. This was a breach of the condition precedent to furnish proofs showing incumbrances. *Markle v. N. D. M. F. Ins. Co.* 28 U. C. Q. B. 525; *Blakeley v. Phœnix Ins. Co.* 20 Wis. 205; *Wellcome v. G. E. M. F. Ins. Co.* 2 Gray, 480; *O'Brien v. Comm. Ins. Co.* 63 N. Y. 111, 113; *Bumstead v. D. Mut. Ins. Co.* 12 N. Y. 81; *Brugnot v. L. S. M. & F. Ins. Co.* 12 La. 326. The failure to perform the condition precedent could be shown under the denial of performance. *Greenfield v. M. M. L. Ins. Co.* 47 N. Y. 430; *Wheeler v. Billings*, 38 id. 263; *Phœnix Ins. Co. v. Munday*, 5 Cald. 547; *Blakeley v. Phœnix Ins. Co.* 20 Wis. 205. The plaintiff also failed to procure the certificate of a magistrate as required by the policy. He had the burden of showing full compliance with this condition precedent, and the failure to prove it establishes the fact against him. Wood on Ins. 710, 713, 715; *Johnson v. Phœnix Ins. Co.* 112 Mass. 49; *Leadbetter v. Etna Ins. Co.* 13 Me. 265; *Hudson v. McCartney*, 33 Wis. 331; *Ind. Ins. Co. v. Capehart*, 108 Ind. 270; *Board v. Hammond*, 83 Ind. 453;

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1 Best on Evi. secs. 266–7. The verdict finds that the magistrate whose certificate was annexed to the proofs "was not the magistrate nearest the place of fire, a number of magistrates living, having their offices, and being nearer to said place than said Sale." As to the alleged waiver the verdict finds that the president of the defendant retained the proofs, "relying on the recital in said certificate" that the magistrate was the nearest and "believing the same to be true;" and that "no other officer or agent of the defendant had anything to do with said proofs." The local agent did not know who made the certificate. To declare a waiver on these facts is to deprive a party of a legal right because he ignorantly keeps silent, when his ignorance is induced by the misrepresentation of the other party. A waiver is the "*intentional* relinquishment of a known right," and must rest on contract or estoppel. *Hoxie v. Home Ins. Co.* 32 Conn. 21–40; *Ripley v. Ætna Ins. Co.* 30 N. Y. 164; *Bennecke v. Ins. Co.* 105 U. S. 355; *Robertson v. M. L. Ins. Co.* 88 N. Y. 541; *Ill. M. B. Soc. v. Baldwin*, 86 Ill. 479; *Ryan v. S. F. & M. Ins. Co.* 46 Wis. 671; *Cannon v. Home Ins. Co.* 53 id. 585; *Rokes v. Amazon Ins. Co.* 51 Md. 512; Bigelow on Estoppel, 506; Wood on Ins. secs. 832, 837. Mere silence of defendant, even if it knew of the non-performance, if it did nothing to influence the conduct of the plaintiff, is not a waiver. *Mueller v. S. S. F. Ins. Co.* 87 Pa. St. 399; *Daniels v. E. F. Ins. Co.* 50 Conn. 551; *Engebretson v. Hekla F. Ins. Co.* 58 Wis. 301; *Noonan v. H. F. Ins. Co.* 21 Mo. 81; *Keenan v. M. S. M. Ins. Co.* 12 Iowa, 126.

For the respondent there was a brief by *Vroman & Sale*, and oral argument by *Mr. Vroman*. They argued, among other things, that under sec. 1943, R. S., where a building is totally destroyed, actual value becomes immaterial, and a misrepresentation of it therefore is immaterial. *Thompson v. St. L. Ins. Co.* 43 Wis. 459; *Bammessel v. B. F. Ins. Co.* id. 463; *Reilly v. Franklin Ins. Co.* id. 449. An over-

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valuation in the preliminary proofs, without intent to defraud or deceive, will not prevent a recovery on the policy. *Dogge v. N. W. Nat. Ins. Co.* 49 Wis. 504, and cases cited. Nor will an over-valuation, with such intent, of a building totally destroyed prevent a recovery. *Bammessel v. B.F. Ins. Co. supra.* The president of the defendant must have known a notary public is not a magistrate. The retention of the proofs without objection was a waiver of all such omissions and defects. *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 25; *Warner v. Peoria M. & F. Ins. Co.* 14 id. 323; *Killips v. P. F. Ins. Co.* 28 id. 480; *O'Conner v. Hartford F. Ins. Co.* 31 id. 165; *Badger v. Phœnix Ins. Co.* 49 id. 399; *Byrne v. R. S. Ins. Co.* 20 Ind. 103; *Phœnix Ins. Co. v. Taylor*, 5 Minn. 493; *Young v. Hartford F. Ins. Co.* 45 Iowa, 383. A preliminary proof of loss is *prima facie* proof of due compliance with conditions of policy, and is addressed to the court. *Hiles v. Hanover F. Ins. Co.* 65 Wis. 585; *Knickerbocker F. Ins. Co. v. Gould*, 80 Ill. 392–3; *Comm. Ins. Co. v. Sennett*, 41 Pa. St. 161. The magistrate's certificate is a part of such proof. *Killips v. P. F. Ins. Co.* 28 Wis. 481.

Orton, J. The defenses to this action on the policy of insurance, set up in the answer, are as follows: (1) That the fire and loss occurred or were caused by the wilful act and procurement of the plaintiff; (2) that the plaintiff fraudulently concealed the fact that the building or dwelling-house to be insured was and had been used as a cooper-shop; (3) that the plaintiff in his proofs of loss fraudulently overestimated the value of the property insured; and (4) that there was not annexed to the proofs of loss the certificate of a magistrate nearest to said fire, as required by the policy. The first and second defenses were negatived by the findings of the jury, and such findings were clearly warranted by the evidence.

As to the third defense, the jury found that the plaintiff

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"*knowingly* and *intentionally* stated in the proofs of loss the amount of loss and damage greater than it actually was," but "*not with intent to deceive or defraud* the defendant." It is ingeniously argued by the learned counsel of the appellant that, these findings being contradictory, the first shall prevail and the second be rejected. Why not reverse the proposition, and reject the first, by the rule that a later statute repeals an earlier one, or the last judgment reconsiders and reverses or overrules a former one? But are these two findings repugnant to each other? It is plausibly argued by the learned counsel that *knowingly* and *intentionally* stating the amount of the loss greater than it actually was must have been with *intent to deceive or defraud.* The jury may have thought that the first finding (which was previously prepared for them by the court or counsel) meant that the plaintiff knowingly and intentionally stated the amount of the loss, which they now found, to be greater than it actually was; in other words, that such statement of the amount was his best and honest judgment, but it was greater than it actually was. The language is peculiar. It would not seem to mean that the plaintiff knowingly and intentionally *overestimated* the value of the property or the amount of the loss. But be this as it may, the first finding on this question comes short of such a fraud as affected the validity of the policy, or the plaintiff's right to the stipulated amount to be paid in case of total loss. The policy covered the building and its contents, and the controversy is mainly concerning the building alone, which was totally destroyed by the fire. In such a case the *actual* amount of the loss was *immaterial*, by virtue of the statute (sec. 1943, R. S.), which provides that the amount of insurance written in the policy on the real property destroyed "shall be taken *conclusively* to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed."

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In view of this statute (ch. 347, Laws of 1874) it was held in *Thompson v. St. Louis Ins. Co.* 43 Wis. 462, that the complaint need not state the value of the property when it was destroyed; and in *Reilly v. Franklin Ins. Co.* 43 Wis. 449, that a defense in the answer that the value of the property destroyed was less than that stated in the policy could not prevail against this statute; and in *Bammessel v. B. F. Ins. Co.* 43 Wis. 463, where the policy contained a provision that "all fraud, or attempt at fraud, by false swearing or otherwise," should cause a forfeiture of all claim under the policy, that such a defense, in respect to the value of the property when destroyed, could not be made. In these cases, the chief justice, in his opinions, considered every view which could even plausibly be taken against the full effect of the statute, and reviewed the authorities claimed to have force against its application, and the question should have been taken as settled and disposed of during the existence of the statute.

It is not perceived how the company could have been influenced by any such over-estimate to settle or compromise, or not to settle or compromise, the claim for the insurance so fixed *conclusively* by the statute; for in no case could the company be compelled to pay more, or could the insured be induced thereby to receive less, than the amount so fixed by law. In this case the agent of the company required of the insured no statement whatever previous to the issuing of the policy, and he made his own examination of the property and his estimate of its value. The authorities cited by the learned counsel of the appellant do not seem to have any application to this case under our statute; and the circumstances in which such an issue might be claimed to be sometimes material, notwithstanding the statute, are not present in this case. This defense, therefore, cannot prevail under any construction of the finding of an over-estimate of the value or loss.

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But, within this defense, it is contended that the evidence showed the existence of a $50 mortgage upon the property when insured and when destroyed, and that such mortgage was not mentioned in the proofs of loss, but fraudulently concealed. The only proof of the existence of any such mortgage, or the particulars thereof, appears to have been as follows: The plaintiff was asked on cross-examination as a witness whether "there was a mortgage on his house at the time of the insurance and of the fire." This question was objected to by plaintiff's counsel, and the judge said: "I don't think it would cut any figure in the case." The counsel of the plaintiff then said: "I will withdraw the objection to its not being cross-examination, if it is simply to be admitted as to the motive this man had." The plaintiff as a witness thereupon answered, "Yes, sir." It was then stipulated that the amount of the mortgage was $50, dated April 3, 1884, from *T. Cayon* to Manuel Brunette; and the witness then said: "There was a mortgage on the house for $50, with ten per cent. interest from the date of the note. The agreement between [him] and Mr. Brunette was that the interest was due when the mortgage was due, and that was two years." It is contended by the learned counsel of the respondent that this evidence of the mortgage was limited in its effect to the *motive* of the plaintiff on the charge of his having burned the building, and that the evidence, having been received for this specific purpose, cannot be used for any other purpose in the case. It would seem, from the strong intimation of the court that the evidence was immaterial, that it would have been rejected for all purposes had not the plaintiff's counsel withdrawn his objection to it upon the condition that it should be used only as to the plaintiff's motive to burn the building. When the evidence was received, therefore, it was received for that purpose only. In such case the rule established in *Hiles v. Hanover F. Ins. Co.* 65 Wis. 585, would

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seem to limit the use of this evidence to such purpose. This was an affirmative defense that ought to have been set out in the answer as notice to the plaintiff. It not having been disclosed by the answer or otherwise, neither the court nor the counsel of the plaintiff could know the object of the evidence or its materiality, and it would be an unwarrantable surprise to now treat it as in the case generally and for all purposes. Had not the fact of the existence of this mortgage been so limited as evidence, and had the plaintiff's counsel known that it would be used to diminish the loss or to show a fraudulent concealment of an incumbrance, perhaps it might have been shown that the agent of the company knew of its existence before the insurance, or some other rebutting evidence might have been given to render the fact harmless to the plaintiff. But it is sufficient to answer the rule that this evidence was so conditionally received. The plaintiff, as the insured, had made no statements or representations whatever as to incumbrances on the property, and was not questioned concerning any, before the policy was issued, and it is not perceived how this $50 mortgage could "cut any figure in the case," as stated by the learned judge before whom the case was tried. The plaintiff, as mortgagor, in this state was the absolute owner of the property, and had an insurable interest to the extent of its value, notwithstanding the mortgage, as we understand the law. May, Ins. §§ 82, 285, and case cited in note 4. But this we do not positively decide, for we do not think the question properly in this case from the evidence as received.

The fourth defense consists in the failure of the plaintiff to furnish proofs of loss with the proper certificate of a magistrate annexed, as a condition precedent to a recovery, or of any claim due or payable. The policy required the assured to "furnish and *annex to the proofs* a certificate of a magistrate nearest the place of fire, who is not a creditor

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or relative of the assured, that he has investigated the facts of the case and that the claim is just and honest," and provided that "until such . . . certificate shall be furnished . . . the claim shall not be due or payable." The certificate annexed to the proofs of loss was that of L. B. Sale, Esq., notary public. There was proof that L. B. Sale, Esq., was not the nearest magistrate to the fire, and there was no proof that he was. But the first and paramount objection to the certificate consists in the fact that he was not a *magistrate*. In the narrower sense in which the term is used, and in which it must have been used in the policy, it means "an inferior judicial officer, as a justice of the peace." The fact that the officer must be a magistrate nearest the place of the fire would seem to indicate that a justice of the peace was the officer intended; for his office and place of business are local and fixed, and he is one of a class of magistrates. In common parlance a justice of the peace is a magistrate and is often called by that name. Bouvier's and Rapalje & Lawrence's Law Dictionaries and Webster's Dictionary agree upon this limited use of the term. The president of the United States and governors of the states are called magistrates, but they are *chief* magistrates, and of course not intended. One thing is very certain, a notary public is not a magistrate and is never called a magistrate. It follows, therefore, that the proofs of loss in this case had not the proper certificate of a magistrate annexed to them, as required by the policy. The proofs of loss, otherwise proper, were furnished to the company in proper time, and were kept by the company without objection until the trial. If they were defective for want of a proper certificate, they should have been returned for that reason at once, so that the proper certificate could be obtained. Retaining them without objection constitutes a waiver of any such objectionable defects. This has been so often decided by this court that we need not

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look elsewhere for authority. *Warner v. Peoria M. & F. Ins. Co.* 14 Wis. 318; *Killips v. Putnam F. Ins. Co.* 28 Wis. 480; *O'Conner v. Hartford F. Ins. Co.* 31 Wis. 165; *Badger v. Glens Falls Ins. Co.* 49 Wis. 389; *Badger v. Phœnix Ins. Co.* 49 Wis. 396. The learned counsel of the appellant seems to have relied upon other defects in the certificate which were not known to the company. But this defect, which is paramount and palpable, the company are presumed to have known. It would be quite immaterial whether Mr. Sale, the notary, was nearest the fire or not, for he was not a magistrate.

We can find no errors in the record which ought to reverse the judgment.

By the Court.—The judgment of the circuit court is affirmed.

HULEHAN, Respondent, vs. THE GREEN BAY, WINONA & ST. PAUL RAILROAD COMPANY, Appellant.

March 7 — March 22, 1887.

RAILROADS: MASTER AND SERVANT: NEGLIGENCE. *(1) Obstructions on track: Negligence of co-employee. (2, 3) Knowledge of danger: Contributory negligence: Burden of proof. (4) Damages: Expense for medical attendence. (5) Appeal: Instructions to jury: Specific exception necessary.*

1. The negligence of a section boss in failing to keep the track clear of obstructions at a point where a brakeman was obliged to run along the same for the purpose of coupling cars, thus rendering the performance of that duty unnecessarily dangerous, is the negligence of the company and it is liable for an injury to the brakeman caused thereby.
2. The burden is upon the railroad company to show that the brakeman assumed the risks growing out of such obstructions by remaining in its employ after knowledge thereof.
3. The fact that the brakeman had general knowledge of the neglect of the company to keep its track clear about its wood-yards, does

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not conclusively show that he assumed all the risks arising therefrom, especially if he did not know of the obstructions on the track at the place where he was injured; and it is a question for the jury in such a case whether he was guilty of negligence in remaining in the employ of the company.

4. In an action for personal injuries, reasonable expenses for medical attendance are a proper element of damages.

5. Where an instruction states the different matters to be considered in estimating damages, an exception should be to the specific matter claimed to be improper and not to the whole instruction.

APPEAL from the Circuit Court for *Trempealeau* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

The plaintiff was a brakeman on the defendant's road, and received an injury while in its employ. At the time the injury was received he was in the act of coupling cars of said company on said road in the usual course of his employment. This action was brought to recover damages of said company for the injury so received. The grounds upon which the plaintiff seeks to charge his injury to the negligence of the company are set forth in the complaint substantially as follows: That it was the plaintiff's duty, as such brakeman, to go between the freight and other cars for the purpose of coupling and uncoupling the same, using the appliances therefor provided by the company, and that it was the duty of the company to provide safe and suitable appliances therefor, and to keep its track in repair and free from obstructions, as well along the side of the track as within it, so as not unnecessarily to expose its employees to danger of personal injury; that, notwithstanding the duty of the defendant in the premises, "the defendant, on the 18th of November, 1882, and for a long time prior thereto, carelessly and negligently suffered and allowed loose blocks of fire-wood to be scattered about near its said track, and along and close to the margins thereof, near Plover station, on the west side of said road, where the

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plaintiff and other brakemen were obliged, in performing their duties, to run along the side of said track and couple and uncouple cars, thereby rendering it unnecessarily dangerous to said plaintiff and other brakemen in the performance of their duties."

The complaint then states the manner in which the plaintiff was injured as follows: "That on or about the said 18th day of November, 1882, and at or near the said place or station called Plover, while the said plaintiff was in the employ of said defendant as aforesaid, it became the duty of said plaintiff, as brakeman, and necessary, that he should go quickly between a box car and a flat car to make a coupling, so called,—that is, to couple the box car, which was being pushed towards the flat car which was standing, to the flat car; that said plaintiff attempted to do so, as he was in duty bound to do, when his toe or foot struck against one of the said pieces or blocks of wood or fire-wood, without any negligence or carelessness on his part, but wholly through the shiftlessness and carelessness of the said defendant as hereinbefore set forth, and said plaintiff was thrown with great force, head first, in between said cars, and to save himself from being cut in two he caught hold of the draw-bar of the flat car at the same time as the draw-bar of the box or moving car came in collision with it, smashing two fingers of the left hand of said plaintiff, and permanently and for life maiming and crippling a third finger, so that two fingers had to be cut off entirely, and the third left comparatively useless; that said accident was caused wholly by the shiftlessness and carelessness of said defendant in allowing its said track, and the margins thereof, to be incumbered and obstructed by the said loose blocks of wood, and without any fault whatever on the part of said plaintiff."

The defendant company demurred to this complaint on the ground that it did not state facts sufficient to constitute

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a cause of action. The circuit court overruled the demurrer. From the order overruling such demurrer the defendant appealed to this court, and upon such appeal this court affirmed the said order, holding that the complaint did state facts sufficient to constitute a cause of action. See 58 Wis. 319–323. The cause was remitted to the circuit court, and the defendant answered the complaint by admitting that it was a corporation and operated a railroad as alleged in said complaint; admitted the employment of the plaintiff as alleged in the complaint, and that by such employment it was his duty to couple and uncouple cars on said railroad as occasion should require. As to all the other allegations of the complaint the answer was a general denial.

On the trial in the circuit court the jury were directed to find a special verdict, and they found a special verdict as follows: "(1) Were the injuries complained of by the plaintiff caused by the negligence of the defendant? *Answer*. Yes. (2) If you answer the first question in the affirmative, state in what such negligence consists. *A*. In allowing sticks or blocks of wood to remain along the track. (3) At the time of plaintiff's injury, how long had sticks or blocks of wood, substantially as they remained at the time of the injury, existed along the track where plaintiff was injured? *A*. Several days. (4) Did the existence of such blocks or sticks of wood make it dangerous for brakemen to couple cars at the place of the injury? *A*. Yes. (5) Were the sticks or blocks of wood along the track at the place of injury allowed to fall there by the employees on the train in loading the tender? *A*. Yes. (6) Of the defendant's employees, whose duty was it to remove such blocks and sticks? *A*. Section foreman. (7) Did not the blocks or sticks exist along the track substantially the same at the time of the injury as at the time when plaintiff commenced work as brakeman? *A*. Yes; about the same. (8) Did plaintiff know of such blocks and sticks existing along the track at

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the time of the injury in question? *A.* No. (9) At what sum do you assess the plaintiff's damages? *A.* $1,300."

After the rendition of the special verdict, and at the same term, the defendant moved the court for a judgment in its favor on such special verdict. This motion was denied by the court, and the defendant excepted, and thereupon moved the court, on the judge's minutes, for a new trial and to set aside the verdict, on the grounds stated in the printed case. This motion was also denied, and the defendant excepted. On the plaintiff's motion, judgment was rendered in his favor on said verdict, and from said judgment the defendant again appeals to the court.

For the appellant there was a brief by *Ellis, Greene & Merrill*, and oral argument by *Mr. Greene.* To the point that the burden of proof was on the plaintiff to show that he did not know of the danger incurred by remaining in the service, they cited Wharton on Neg. sec. 243; Wood on M. & S. secs. 382, 419; *Walsh v. Peet Valve Co.* 110 Mass. 23; *Williams v. Clough*, 3 Hurl. & N. 258; *Wonder v. B. & O. R. Co.* 32 Md. 411; *Warner v. Erie R. Co.* 39 N. Y. 468; *Skipp v. E. C. R. Co.* 9 Exch. 223; *Riley v. Baxendale*, 6 Hurl. & N. 445; *Beaulieu v. Portland R. Co.* 48 Me. 291.

E. C. Higbee, for the respondent.

TAYLOR, J. We think the decision upon the demurrer in this case must be held as conclusive upon the appellant that it was negligence on its part to permit its track to be incumbered with sticks and blocks of wood in the manner alleged in the complaint, at all places where the plaintiff was called upon to perform his duties in coupling or uncoupling the cars of the defendant. The allegation in the complaint is "that it was the duty of the company to provide safe and suitable appliances for coupling and uncoupling its cars, and to keep its track in repair and free from obstructions, as well along the side of the track as within it, so as

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not unnecessarily to expose its employees to danger of personal injury," and it then alleges facts showing that such duty had not been discharged by the company. This court having held that the complaint stated facts constituting a cause of action, it would seem that if, upon the trial, the facts are proved which are alleged in the complaint as establishing the neglect of such duty imposed by law upon the defendant to be discharged towards the plaintiff, its employee, the defendant cannot be heard to say in this case that no such duty rested upon it. That question was settled against him on the former appeal. The only questions to be determined upon the trial of the case are: (1) Has the plaintiff established by proofs the facts set up in the complaint as constituting the negligence charged against the company? (2) Whether such negligent acts, if proved, were the cause of the injury to the plaintiff. (3) Whether the plaintiff had such knowledge of the neglect of the company in respect to these matters, that he must be presumed to have assumed the risk of such neglect?

In this view of the case it was incumbent on the plaintiff to show affirmatively that at the time the accident happened the track, at the place where he was called upon to couple the cars, was in an unsafe condition by reason of sticks and blocks of wood lying along-side of and near the track; that such sticks and blocks of wood caused his injury; and that such obstruction of the track was either known to the company or had existed for such length of time before the accident as to constitute notice to the company that the track was in an unsafe condition at that place. These facts are all found by the jury in favor of the plaintiff, and we think upon evidence which is sufficient to support such findings. That the first two propositions are amply sustained by the evidence there can be no serious question. As to the third, the evidence is not so satisfactory. Still there was undoubtedly sufficient evidence to send that question

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to the jury; and, they having found substantially in favor of the plaintiff on that point under proper instructions by the court, the finding cannot be disregarded by this court.

The learned counsel for the appellant insists that the question whether negligence in keeping the roadway in a safe and suitable condition is negligence which, as between the plaintiff and the company, must be chargeable upon the company or upon a co-employee of the plaintiff, is an open question in this case, and he has submitted a very able argument upon the hearing to satisfy the court that the neglect of the company's servant who is charged with the duty of keeping the track clear of obstructions and in a safe and suitable condition for use by those employees whose duty it is to use the same, is the neglect of a co-employee, for which the company is not chargeable. While, as said above, we think the question is not an open question in the case at bar, we are of the opinion that under the proofs in this case and the decisions of this court the negligence in permitting the roadway to be obstructed with sticks and blocks of wood was the negligence of the company, and not merely the negligence of a co-employee of the plaintiff, within the rules of law which hold that one employee cannot recover of the master damages for injuries caused by the negligence of a co-employee. Whatever may be the rule of other courts upon this point, we think the following cases in this court settle the rule against the contention of the learned counsel: *Smith v. C., M. & St. P. R. Co.* 42 Wis. 520; *Brabbits v. C. & N. W. R. Co.* 38 Wis. 289; *Wedgwood v. C. & N. W. R. Co.* 41 Wis. 478; *Schultz v. C., M. & St. P. R. Co.* 48 Wis. 375; *Dorsey v. P. & C. Const. Co.* 42 Wis. 583; *Bessex v. C. & N. W. R. Co.* 45 Wis. 479. And my individual opinion is that the rule as stated in the cases above cited is sustained by the great weight of authority in this country.

The learned counsel for the appellant insists that the evi-

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dence discloses that the plaintiff had full knowledge of the alleged obstruction of the defendant's track which caused his injury, before the accident happened; and, if he remained in the employ of the company after such knowledge on his part, he assumed all the risks growing out of such obstruction. This alleged state of facts is matter of defense, and need not be negatived by the plaintiff in making out his case. The burden of this defense is, under the rules established in the courts of this state, upon the defendant. See *Randall v. N. W. Tel. Co.* 54 Wis. 147; *Hoth v. Peters*, 55 Wis. 405; *Kelly v. C. & N. W. R. Co.* 60 Wis. 480; *Hough v. Railway Co.* 100 U. S. 225; *McNamara v. Clintonville*, 62 Wis. 207. See, also, *Ind. & St. L. R. Co. v. Horst*, 93 U. S. 291; *Railroad Co. v. Gladmon*, 15 Wall. 401. This question was also submitted to the jury, and they found in favor of the plaintiff.

It is urged that this finding is wholly unsupported by the evidence. We think otherwise. The evidence shows that the plaintiff, when he received his injuries, had only been in the defendant's employ as a brakeman about two weeks; that he knew there was wood scattered along the track near the wood-piles on the road, but that he had not noticed that wood was scattered along the track at the place where he was injured. His testimony is the only testimony given on the trial on the question. His evidence shows that he had a general knowledge of the neglect of the company in keeping its tracks clear about its wood-yards. There is, however, no evidence showing his knowledge of the condition of the track at the place where the injury occurred. This evidence is not conclusive upon the plaintiff that he assumed all risk which arose from such neglect of the company. Even had he known of the existence of the wood lying along the side of the track at the place where he was injured, it would not be conclusive against him. He might have had a general knowledge of the defects of the road,

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but may not have had such knowledge of the dangerous character of such obstructions as to absolutely charge him with the assumption of all the risks arising from such obstructions. Notwithstanding his knowledge of the fact of the obstructions, still it was a question for the jury whether he was guilty of negligence in remaining in the employ of the defendant after such knowledge. For this reason, and because there was no evidence that he had knowledge of the particular obstruction which caused the injury, we cannot say that the verdict of the jury upon this question is against the evidence. See *Spearbracker v. Larrabee*, 64 Wis. 578; *Wheeler v. Westport*, 30 Wis. 392; *Cuthbert v. Appleton*, 24 Wis. 387; *Russell v. M. & St. L. R. Co.* 32 Minn. 230; *Cook v. St. P., M. & M. R. Co.* 34 Minn. 45.

The appellant excepts to a few isolated sentences in the charge of the court. As we understand it, one exception to the charge is that the judge seemed to assume that there was a stick of wood near the track where the accident happened, and that the plaintiff stumbled over the same. Upon this question there is no conflict of evidence. The plaintiff states positively that there was a stick of wood lying on the end of the ties, and that he fell over it, and to save himself he threw up his hand and so received the injury. We think the learned judge might well assume that this fact was proved in the case, in the absence of any request that the fact should be submitted to the jury as a fact disputed by the defendant. Another objection to the instructions is that they ignore the question whether the negligence was not that of a co-employee. This objection has been disposed of above in this opinion.

It is further objected that the judge erred in stating to the jury that, in estimating the plaintiff's damages, "he would be entitled to such a sum as he reasonably expended for the purpose of being cured of his injury, and such sum as he lost for his earnings by reason of the time which was

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necessarily lost by his injury. He is also entitled to such sum as will fairly compensate him for the disfigurement of his person and the impaired use of his hand." It is urged that in this statement the court improperly included "what he had reasonably expended for the purpose of being cured of his injuries." There can be no doubt that this is a proper item of damages in cases of this kind. But it is urged that the plaintiff failed to show by his evidence that he had expended any particular sum for that purpose, and therefore the jury ought not to take that into consideration. He did show that he had the care of two doctors, one immediately after his injury, and another a day or two after, who amputated his fingers. There are two reasons why the defendant ought not now to avail himself of this objection: *First*, because the rule as stated was the correct rule, and, if not applicable to the facts of the case because of the absence of any evidence showing the amount of his expenses in being cured, the defendant should have called the attention of the court to that fact; and a *second* and perhaps better reason why the defendant should not now avail himself of the objection is that the exception was not to the particular fact which is now alleged to be error, but to the statement as a whole. The exception was not, therefore, sufficiently specific, as it is admitted that most of the matter excepted to was properly given to the jury. Had the specific exception been taken at the trial which is now taken, it is highly probable that the error, if any, would have been corrected on the spot.

On the whole record, the case seems to have been fairly tried, and the damages awarded are moderate, considering the extent of the plaintiff's injuries.

By the Court.—The judgment of the circuit court is affirmed.

See notes to this case in 32 N. W. Rep. 529.—REP.

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SASSE, Plaintiff in error, vs. THE STATE, Defendant in error.

March 7 — March 22, 1887.

CRIMINAL LAW AND PRACTICE. *(1, 2) Improper remarks by prosecutor: Error, when cured: New trial. (3-5) View of premises: Presence of counsel: Absence of prisoner: Object: Evidence.*

1. An error in permitting the district attorney, in opening the case to the jury, to state that the defendant committed a crime in Germany and fled from justice, and after landing in this country committed another crime, etc., is *held* to render a new trial necessary, although the trial judge, in ruling that such statement could be made, suggested that the fact that the accused had committed one crime was no evidence that he committed the crime for which he was being tried, and afterwards instructed the jury not to regard such statement and that it was not in the case.
2. When the first witness for the prosecution was called he did not respond, and the district attorney said, "Perhaps somebody has got hold of him." Being reproved by the trial court, he said "I will prove it before I get through." *Held*, improper.
3. If counsel are allowed to accompany the jury upon a view of a place where a crime is alleged to have been committed, they should not be allowed, while there, to discuss the localities or call the attention of the jury to the facts.
4. *Quære*, whether a view may be taken in the absence of a defendant who has not expressly waived his right to be present.
5. The object of a view is merely to assist the jurors in weighing and applying the evidence. The knowledge derived from the view itself is no part of the evidence.

ERROR to the Circuit Court for *Dodge* County.

The case is sufficiently stated in the opinion.

Geo. W. Sloan, for the plaintiff in error, argued, among other things, that the language used by the district attorney in his opening address was improper, and the failure of the court to stop him *then* and *there* is good ground for a new trial. 1 Am. Crim. Rep. 580; *State v. Williams*, 65 N. C. 505; *Ferguson v. State*, 49 Ind. 33; *State v. Kring*, 64 Mo. 591; *S. C.* 2 Am. Crim. Rep. 313; *Long v. State*, 56 Ind. 182;

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Comm. v. Scott, 123 Mass. 239; *Austin v. People*, 102 Ill. 261; *People v. Tyler*, 36 Cal. 522; *State v. Graham*, 62 Iowa, 108; *State v. Williams*, 63 id. 135; *Koelges v. G. L. Ins. Co.* 57 N. Y. 638; 33 Conn. 471; 41 N. H. 317; 75 N. C. 306; *Williams v. State*, 61 Wis. 281. The accused must be present at a view, unless he waives the right. Sec. 4693, R. S.; Const., art. I, sec. 7; *People v. Jones*, 11 Pac. Rep. 501; *People v. Bush*, 68 Cal. 623; 53 Cal. 60; Cooley's Const. Lim. sec. 319; 4 Am. Crim. Rep. 417; *Benton v. State*, 30 Ark. 350; *Dempsey v. People*, 47 Ill. 325; *People v. McKay*, 18 Johns. 217; *Burley v. State*, 1 Neb. 385; *Work v. State*, 2 Ohio St. 296; *Cancemi v. People*, 18 N. Y. 128; *Wilson v. State*, 16 Ark. 601; *Bond v. State*, 17 id. 290; *Brown v. State*, 16 Ind. 496.

The *Attorney General*, for the defendant in error, contended, *inter alia*, that the error in permitting the improper remarks by the district attorney was cured. *State v. Degonia*, 69 Mo. 490; *State v. Wilson*, 90 N. C. 736; *State v. Rivers*, id. 738; *Mimms v. State*, 16 Ohio St. 221; Wharton's Crim. Pr. & Pl. sec. 803; *State Bank v. Dutton*, 11 Wis. 373; *Richards v. Noyes*, 44 id. 609. It was not error not to order the accused to be present at the view. Consent was given in open court that the district attorney and counsel for the accused should accompany the jury, and there was no order restraining the accused from going. See *People v. Bonney*, 19 Cal. 445; *State v. Adams*, 20 Kan. 323; *State v. Congdon*, 14 R. I. 458; *Rutherford v. Comm.* 78 Ky. 639; *Hill v. State*, 17 Wis. 676; *State v. Paylor*, 89 N. C. 539.

Orton, J. The plaintiff in error was tried and convicted, in the circuit court of Dodge county, for the crime of murder in the first degree for the killing of William Martin, in said county, on the 10th day of July, 1885, and was sentenced to imprisonment in the state prison during his natural life. We refrain from any further reference to the evidence in the case than to say that it appears to have

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been wholly circumstantial. At the first opening of the case to the jury by the district attorney, and before any testimony had been taken, he stated to the jury as follows: "The defendant committed a crime in the old country,—in Germany,—and he fled from justice. He engaged passage in one ship, and then in another. He landed in this country, and went to Philadelphia, committing a crime there. He admitted that he knocked a hole in a man's head in the old country, and by his admission fled and committed a crime in Philadelphia,—a crime on one of the citizens of this country." To these remarks to the jury the defendant's counsel objected. The circuit court overruled the objection, with the remark as follows, viz.: "I suppose the previous history of the defendant may be given, but the fact that he committed one crime is no evidence that he committed this. The court permits the district attorney to proceed as far as to state the previous history of the defendant, with the suggestion, however, that because he committed one crime it is no evidence that he committed the crime of which he now stands charged." To which ruling the defendant's counsel excepted. The district attorney then proceeded as follows: "He assumed another man's name. He obtained money under false pretenses," and told how he came to admit the crime before stated. The district attorney afterwards repeated the remark that "the defendant knocked a hole in a man's head," which was also excepted to. The learned judge before whom the case was tried instructed the jury, in reference to these remarks of the district attorney, as follows: "You will not regard any statement of counsel that the defendant committed a crime in Germany, or that he was a fugitive from justice, or that he came here under an assumed name, all of which things are not in the case." On denying the motion for a new trial in the case, the learned judge remarked as follows: "The district attorney stated in his opening that the defendant had been guilty of some crime

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in Germany, etc. Whether that be such an error as will reverse the judgment I am not certain. That it was error permitting the district attorney to make the statement, I haven't any doubt; but that it was cured I am of the impression. I am disposed to let the supreme court pass upon the question."

The language of the learned judge in his instructions to the jury and in these last remarks is here quoted to his credit, as well illustrating his characteristic candor, frankness, fairness, and sense of justice. And it was thought proper that it should be reproduced, to accompany and explain his first ruling upon the remarks of the district attorney in opening the case to the jury. The facts stated by the district attorney would not have been competent or proper evidence if placed before the jury under the sanctions of an oath, and they were much more improper when pressed upon the attention of the jury by the authority of the prosecuting officer of the state, and produced a greater and more lasting effect. These remarks of the district attorney, so grossly improper, unprofessional, and unjust, and so repeated and asseverated to the jury, when their minds were entirely free from bias, prejudice, or partiality, when they had no knowledge or opinion of the defendant or of the merits or demerits of his prosecution, and before they had heard any evidence, and when they were bound to presume him innocent, must have produced an ineffaceable and permanent impression. After hearing the recital of these crimes charged to have been committed by him, and that he was yet a fugitive from justice, their suspicions were aroused, and in their minds the *probability* of his guilt in the present case was already established, and they were ready and in fit mood to construe every fact and circumstance in the evidence that was afterwards produced, and resolve all doubts, against the prisoner at the bar. Then, after all the evidence is given and their opinions were

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forming or already formed,— whether from the evidence alone, or from the evidence corroborated and strengthened by these terrible charges of the district attorney, they could not tell,—and after the court had said in their presence, directly in connection with those charges of previous crimes, "I suppose the previous history of the defendant may be given," what avail was it for the court to instruct the jury that they need not regard any statement of the district attorney that the defendant committed a crime in Germany, etc.? They had already regarded it. It was fastened upon their minds, and was mingled with the testimony past the possibility of separation, and it had been weighed with the testimony in those nicely balanced scales which are made so easily to preponderate. The statements had been deliberately made, and they were approved by the court. It was too late, at the end of the trial, to correct the error. Their full effect upon the minds of the jury had been produced in prejudicing them against the prisoner, and unfitting them for an impartial hearing of the evidence and trial of the case. What though they were told by the court that "the fact that the defendant committed *one crime* was no evidence that he committed *this*"? This language of the court came very near sanctioning the charge made by the district attorney, or taking it as true. It was enough that the defendant came before the jury for trial for this crime, already guilty of several other crimes by the solemn and deliberate statement of this high and impartial officer of the state and of the court. It was impossible that he should have a perfectly fair and impartial trial after this. I never heard of such an opening speech from a prosecuting officer before, and I question if there ever was one so violent and reprehensible. Now that this case is before this court on this alleged error, to sanction it would overrule every previous case decided by this court in which such an error was assigned, and be in conflict with all of the decisions of other

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courts upon this question. The remarks of counsel to the jury upon matters outside of the evidence in *Bremmer v. G. B., S. P. & N. R. Co.* 61 Wis. 114, which were deemed in that civil case sufficient error to reverse the judgment, were a thousand times more harmless. In *Brown v. Swineford*, 44 Wis. 282, the remarks were far less objectionable, and they were held of sufficient consequence to reverse an otherwise meritorious judgment. Chief Justice RYAN said in that case: "It is sufficient that the extra-professional statements of counsel may gravely prejudice the jury and affect the verdict;" citing *Tucker v. Henniker*, 41 N. H. 317; *State v. Smith*, 75 N. C. 306; *Ferguson v. State*, 49 Ind. 33. A great many similar cases are cited in the brief of the appellant's counsel in that case, and in the brief of the learned counsel of the plaintiff in error in this case, to which reference may be had. For these very objectionable remarks of the district attorney, so approved by the court, we are compelled to reverse the judgment of conviction in this case and order a new trial.

After the opening of the case, and when the first witness was called for the state and did not respond, the district attorney said, in the presence of the jury, "Perhaps somebody has got hold of him;" intimating that some one on behalf of the defendant had tampered with the witness or spirited him away. The court so understood the remark, and reproved the district attorney for making it, saying "that it did not follow that there is any tampering with the witness because he was absent." The district attorney thereupon said, "I will prove it before I get through." He did not thereafter even offer to prove this charge. He evidently made this unfounded charge to prejudice the defendant's case in the minds of the jury. This may not of itself be such an error as to warrant a reversal of the judgment, but it was grossly improper, and very unfair towards the prisoner, and was wickedly consistent with his preceding un-

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warrantable and reprehensible assault upon the defendant's previous character.

The judgment must be reversed for the above error, and it may be unnecessary to consider other errors alleged in the record or to determine whether they are such. Yet, as the case must again be tried *de novo*, it would be well to avoid at least the error assigned in relation to the *view* of the premises or locality where the murder was supposed to have been committed, the manner in which it was taken by the jury, and the legal purpose and effect thereof as stated in the instructions.

The counsel for the state and for the prisoner were both allowed to be present with the jury upon this view, while the prisoner was not. The respective counsel in their affidavits recriminate upon each other as to their conduct in attempting to direct the observation and influence the judgment of the jury in respect to the particulars of the place and the local scenes of the various and successive acts of the drama while they were making their view. The court, in allowing them to accompany the jury, cautioned them, very properly, not to discuss in their presence the localities, but told them, and we think improperly, that they might call their attention to the facts, as "Here is where they found him;" "Here is a barrel;" "Here is where Gusta was." The great temptation to improper communication with the jury in such an outdoor and informal view, and unrestrained discussion with them of the relative bearings of objects and places upon the facts in issue, has caused us to question the propriety of leading the respective counsel into it. There appears to be no grave necessity that they should attend the jury upon such an excursion, and it would seem that the jury ought to depend upon their own knowledge of the case, derived from the evidence, and upon their own undirected and uninfluenced observation. There is, on such a view, at least a tendency for them to disband and wander

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about in detachments in search of new discoveries, affording excellent opportunities for the polite and unsuspected attentions of the counsel. It might be as well for the jury to be unaccompanied except by the proper officer.

The jury were instructed upon the uses of their view as follows: "What they saw legally becomes a part of the evidence in the case. That was the purpose for which the jury were sent to view the premises." This would appear to be in conflict with the decision of this court in the recent case of *Seefeld v. C., M. & St. P. R. Co.* 67 Wis. 96. It is said in the opinion in that particular case that "the knowledge acquired by the view was to be used only in determining the weight of conflicting testimony of value." The object and office of the view are thus stated in *Washburn v. Mil. & L. W. R. Co.* 59 Wis. 364: "To enable the jurors better to understand the evidence on the trial." This was the purpose at common law. Jac. Law Dict. tit. "View." It is not to obtain *original* testimony in addition to or contradiction of the evidence given in court, or independent of it, but to obtain a more perfect knowledge of the evidence, and to enable the jury to better understand it, and to consider it in the light and by the aid of the sensible objects and localities disclosed by the view. It is said in *Munkwitz v. C., M. & St. P. R. Co.* 64 Wis. 403: "The view of the premises by the jury is for the purpose of assisting them in weighing and applying the evidence." That case was peculiarly apt as furnishing the foundation of the correct rule. There are other cases in this court and in other courts, and some of them are cited by counsel in his brief, which lay down this as the correct rule. It will be perceived that the court in this case extended the rule so far as to make the knowledge of the jury derived from the view independent evidence of facts material to the issue, without any reference to that which was given in court. We may say further, in respect to the view in this

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case, on the trial of the defendant for a capital offense, that we think it very questionable whether it should have been taken in his absence, unless he expressly waived his right to be present.

We regret that the error of allowing the district attorney to make such an opening statement to the jury is so marked, important, and material that the judgment has to be reversed and a new trial ordered; but, as it is, it cannot be avoided.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial. The warden of the state prison will surrender the plaintiff in error to the sheriff of Dodge county, who will hold him in custody until he shall be discharged or his custody changed by due course of law.

See note to this case in 32 N. W. Rep. 849.— REP.

PEITZ, Plaintiff in error, vs. THE STATE, Defendant in error.

March 8 — April 12, 1887.

Excise laws: Sale of beer by brewer in another town.

Under sec. 4, ch. 296, Laws of 1885, a brewer cannot establish an agency for the sale of his beer in a town away from his place of business, and sell to such persons as desire to purchase, without obtaining a license from the authorities of the town where the sale is made. *Scanlan v. Childs*, 33 Wis. 663, distinguished.

CASSODAY and ORTON, JJ., dissent.

ERROR to the Circuit Court for *Richland* County.

The case is stated in the opinion.

For the plaintiff in error there was a brief by *Brooks & Dutcher*, and oral argument by *Mr. Brooks*. They cited *Brown v. Maryland*, 12 Wheat. 419; *License Cases*, 5 How.

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504–574; *Baker v. Callendar*, 118 Mass. 390; *Richards v. Woodward*, 113 id. 285; *Scanlan v. Childs*, 33 Wis. 663; *St. Paul v. Troyer*, 3 Minn. 291; *Sarbecker v. State*, 65 Wis. 171.

The *Attorney General*, and *L. K. Luse*, Assistant Attorney General, for the defendant in error, argued, among other things, that the legislature might prohibit absolutely both the manufacture and sale of intoxicating liquors. *State v. Downer*, 21 Wis. 277, 279; *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Mass.* 97 U. S. 25; 22 Cent. L. J. 281, note. By the statutes in question the legislature intended to permit manufacturers to sell at wholesale at the place of manufacture, but did not intend to grant to them a privilege of selling to customers for consumption, which was denied to other persons. *State v. Tarver*, 11 Lea, 660; *State v. Joyner*, 81 N. C. 534.

Cole, C. J. The plaintiff in error, the defendant below, was convicted in the circuit court of selling beer without a license. There is no dispute about the facts, which are, in brief, these: The defendant sold a keg of beer direct to the consumer in Richland Centre without having obtained a license from the authorities of the village to sell beer. The beer sold was a keg of four gallons, sealed and stamped, and had the name of the manufacturer branded on the keg. Of course it was in the original package, and the defendant sold it as the agent of the manufacturer, a brewer who resided at Muscoda, a place about fifteen miles distant from Richland Centre. The manufacturer had a regular license from the United States to manufacture beer at Muscoda. He owned a building in Richland Centre, where he sent beer to be stored and sold by his agent, as he says, "to any one who desired to get it." The question therefore presented by the record is, as fairly stated by the assistant attorney general in his brief, Can a brewer establish an

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agency for the sale of beer of his own manufacture in a town away from his place of business, and sell to such persons as desire to purchase, without obtaining a license for carrying on such business from the town, city, or village authorities in which the sale is made? We think this question must receive a negative answer. The sale was made in May, 1886, and the provisions of ch. 296, Laws of 1885, apply to it. Sec. 4 of that statute provides, in substance, that if any person shall vend, sell, deal, or traffic in, or, for the purpose of evading any law of this state, give away, any spirituous, malt, ardent, or intoxicating liquors or drinks in any quantity whatever, without first having obtained a license or permit therefor as required by that chapter, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished, etc. The language of this enactment is clear, comprehensive, and explicit, and really leaves but little room for construction. The words "if any person shall vend," etc., are broad enough to include the sale made by the defendant, and unless by some subtle or forced interpretation an exception is made, or the words are limited in their plain meaning, they must be held to cover the case.

But the learned counsel for the defendant says the manufacture of beer is a lawful pursuit or business in this state under the regulations prescribed by Congress, and that such lawful business carries with it the implied right to sell the manufactured product in the original package to any one who may desire to purchase it. But we suppose it is a well-settled principle in the jurisprudence of the country that the legislature may entirely prohibit the sale of malt or spirituous liquors within the state by laws prospective in their operation. Judge Cooley says: "Those statutes which regulate or altogether prohibit the sale of intoxicating drinks as a beverage have also been by some persons supposed to conflict with the federal constitution. Such of them, however, as assume to regulate merely, and to prohibit sales by

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other persons than those who are licensed by the public authorities, have not suggested any serious question of constitutional power. They are but the ordinary police regulations, such as the state may make in respect to all classes of trade or employment. But those which undertake altogether to prohibit the manufacture and sale of intoxicating drinks as a beverage have been assailed as violating express provisions of the national constitution, and also as subversive of fundamental rights, and therefore not within the grant of legislative power." Const. Lim. 582.

So far as the imported product is concerned, while it remains unbroken in the original package, it is under the protection of the commercial clause of the constitution. But as soon as the package is broken up for use or for retail in the hands of the importer it is under state regulation. There can be no doubt of the power of the legislature to regulate the sale of beer manufactured in this state while in the hands of the manufacturer. The only question is, Has it done so? We have indicated our opinion that the law as it now stands applies to the sale made by the defendant.

But the counsel relies upon the decision of *Scanlan v. Childs*, 33 Wis. 663, where it was held that the manufacturer of ale and beer or other spirituous liquors had the right to sell his product to a dealer, according to the usual custom of such manufactures, without taking out a license. In that case the beer and ale were sold in the place where manufactured, in the original casks as put up, at wholesale, to a retail dealer in the same city who kept a saloon and sold beer at retail, having a city license for that purpose. Chief Justice DIXON gave the opinion in that case, and by a course of reasoning reached the conclusion that the excise law applied "only to the vending of liquors at wholesale or retail by persons who buy for that purpose and carry on that business, and not to sales by manufacturers of articles

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made by themselves and put up and disposed of in quantities to dealers according to the usual course of such manufacture and of the trade connected with it." The writer participated in that decision, and assumes his full measure of responsibility for it. Whether he would so construe the excise laws now is an immaterial inquiry. We are all certainly opposed to extending that decision to any case which by its facts is not fully brought within it. The case before us is essentially different from *Scanlan v. Childs*. Here the beer was sold directly to the consumer, at a place distant from where it was manufactured. As the assistant attorney general says, the brewer established an agency for the sale of beer of his own manufacture in a town away from his place of business, and sold to such persons as desired to purchase, without obtaining any license from the authorities of the village where the sale was made. We have no doubt whatever that this was a violation of law. It is true, the excise law upon this precise point is now substantially as it has been since it was first enacted in 1851. In *Scanlan v. Childs* much stress was laid upon the practical construction of the excise law by the officers of the government whose duty it was to execute it. Whatever force there was in that argument in 1873 has been greatly strengthened in view of the fact that the excise law has been revised more than once since the *Scanlan Case* was decided, and no material change has been made in its phraseology on this subject. The legislature must be presumed to have known of the interpretation which had been placed upon the law; that it had been held that it did not apply to a manufacturer selling his products in quantities to a dealer who sold them to other persons, having a license for that purpose. It is certainly a consideration of much weight that the construction placed upon the law in the *Scanlan Case* has been apparently acquiesced in as correct by the legislature, since its language has not been changed. But, as we have said,

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we are opposed to the extension of the *Scanlan* decision to any case which does not come fully within its material facts.

The defendant's counsel relied upon the decision in *Sarbecker v. State*, 65 Wis. 171, as having an important bearing upon this case. We cannot perceive that it applies to it; hence it need not be commented upon.

It follows from these views that the conviction of the defendant below must be affirmed.

By the Court.— Judgment affirmed.

CASSODAY, J. I am unable to concur in the reasoning of the chief justice in the opinion filed, as to the scope of the decision in *Scanlan v. Childs*, 33 Wis. 666, 667. That decision was made before the writer hereof became a member of this court; but he recognizes the imperative duty, generally acted upon, that a court of last resort should adhere to its own decisions until convinced that they are clearly wrong, and then squarely overrule them, to the end that the people may know just what the laws are, so as to shape their conduct accordingly or change the law in the only legitimate way,— by legislation. In the case at bar neither course is to be pursued, if I correctly understand the significance of the opinion of the court in the case mentioned. It is conceded in the opinion filed herein that the statutes under which that decision was made were substantially the same as the statutes under which this is made. The statutes then, as well as now, after prescribing the conditions upon which licenses might be granted to sell at retail and also at wholesale, provided that "if any person shall vend, sell, deal, or traffic in, or, for the purpose of evading any law of this state, give away, any spirituous, malt, ardent, or intoxicating liquors or drinks in any quantity whatever, without first having obtained a license or permit therefor as required by this chapter, he shall be guilty of a misde-

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meanor," etc. Sec. 5, ch. 35, R. S. 1858; sec. 5, ch. 179, Laws of 1874; sec. 1550, R. S.; sec. 4, ch. 296, Laws of 1885. In the case cited it was conceded that the manufacturer of the beer and ale had no such license. Yet the court in that case said, per DIXON, C. J., that "the manufacture of ale or beer, or of any spirituous or intoxicating liquor, has never been prohibited by legislative enactment, nor has a license for such manufacture been required or any duty or impost laid thereon by statute. The statutes of the state are silent upon the subject, so that the manufacture cannot but be a lawful pursuit or business; and, that being so, it seems to follow that the sale in packages or casks, according to custom among the makers of such articles, is also lawful, unless such sale is regulated or restricted by some express statutory provision. *The authority to make implies the authority to sell* in the accustomed way, except so far as the legislature has imposed some positive restriction or expressly enacted to the contrary. . . . The question presented, therefore, is whether this *implied right* has been abridged or taken away by the provisions of the excise law above cited; and it seems clear to our minds it has not. . . . The statute may contain words, it is true, which by latitude of construction might include such sales by manufacturers; but those are restrained, and such construction forbidden, by the context. The practical construction, that which has been so long given to the statute by the executive and administrative officers, is, in our judgment, the correct one; and it must accordingly be held that the sales in question by the manufacturer were lawful, notwithstanding he had obtained no license to make them. And this conclusion is confirmed by the consideration, also alluded to by counsel, that no adequate or suitable provision is made by statute for the licensing of such sales by manufacturers,—a circumstance which tends very strongly to show that the obtaining of a license was not intended."

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The logic of this decision is very plain. It is, in effect, that the statutes mentioned did not include such manufacturers; that they were at liberty to so manufacture without obtaining any such license; that, having acquired such product by their own manufacture, they had the implied right to sell the same without such license. I am not now arguing whether that decision is sound or unsound, but simply that the case at bar comes within it. If that decision is right, then it seems to me this is necessarily wrong; and, if this decision is right, then that should be squarely overruled. True, in that case the sale of the beer and ale was in the city where it was manufactured; but the statute made no such exception. On the contrary, the same statutes which punish sales without a license here, were then in force there. True, in that case the sale was to a dealer, but there was nothing in the statute then, and there is nothing in the statute now, which makes the right to sell depend upon the business or occupation of the purchaser. It was the *selling* without such license that the law punished, and not merely because the sale was to A. instead of B. The statute no more make the punishment dependent upon the business of the purchaser than it does upon his nationality or complexion. I am not aware of any rule of construction which should make the operation of a statute dependent upon any such extrinsic circumstances. I repeat, the doctrine asserted in *Scanlan v. Childs* should either be applied in its integrity to cases as they arise, or be squarely overruled.

Orton, J. I concur in the above opinion.

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SAGE and others, Respondents, vs. THE TOWN OF FIFIELD and others, Appellants.

March 22—April 12, 1887.

(1) Equity: Injunction: Illegal tax. (2, 3) Highway taxes: Powers of electors and of supervisors.

1. An injunction will not be granted, at the suit of tax-payers, to restrain town officers from issuing town or road orders or incurring expense in anticipation of the collection of a tax voted for highway purposes in excess of the amount authorized by law, or from placing such tax upon the tax roll.
2. Under sec. 1240, R. S., as amended by ch. 163, Laws of 1883, the electors of a town containing two congressional townships may direct the supervisors to assess as highway taxes any amount not exceeding fifteen mills on the dollar of the valuation of property in the town, provided such amount does not exceed $3,000 and seven mills on the dollar of such valuation.
3. In such a town it had been decided to collect the highway taxes in money. The valuation of property exceeded $500,000. The electors voted to raise a highway tax of $5,000. *Held*, that if it was necessary thereafter for the supervisors to direct the assessment of so many mills on the dollar as would make such sum of $5,000, they might do so by directing that amount to be apportioned upon the assessment roll.

APPEAL from the Circuit Court for *Price* County.

The following statement of the case was prepared by Mr. Justice TAYLOR as a part of the opinion:

This action is brought by the plaintiffs, owners of real estate subject to taxation in the town of *Fifield*, to have it adjudged by the court that a vote of the electors of said town, at the annual town meeting in said town, on the first Tuesday of April, 1886, to raise $5,000 as a road tax in said town for the year 1886, is void as to the sum of $3,000, and to restrain the supervisors of said town from incurring any expense, auditing any bills, or issuing any orders on the strength of said vote to raise $5,000 for such road purposes

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for the year 1886, in excess of $2,000, and to restrain the chairman and clerk from signing any orders on the road fund of said town, or in anticipation of the levy of said $5,000, in excess of the sum of $2,000. The material allegations of the complaint, after the formal parts thereof, are that the plaintiffs are large owners of real estate in said town subject to taxation; that said town of *Fifield* contains more than two congressional townships; that, by reason thereof, the town has no authority to levy upon the taxable property thereof, to be raised in money, exclusive of the mill tax, any sum in excess of $2,000; that, at the town meeting in said town in 1886, the electors of said town voted to raise for highway purposes, to be collected in money from the taxable property of said town, the sum of $5,000; that said vote of the electors was illegal and void as to the excess over $2,000. The complaint then alleges that the supervisors of said town intend to and will, unless restrained by the court, issue town or road orders in anticipation of the levy and collection of said sum of $5,000; that there is no money in the treasury of said town to pay road or highway orders, and no money whatever belonging to the highway fund; and that the plaintiffs are informed and believe that said supervisors intend to proceed with road work, and incur expense on the strength of said vote, to the full amount of said sum; that the town clerk of said town intends to, and unless restrained by the court will, place said sum of $5,000 in the tax roll for collection, and will extend the same proportionately as a tax upon the real estate and personal property of said town. This action was commenced on the 4th day of May, 1886.

To the complaint the appellants answered, admitting that the plaintiffs owned taxable real estate in said town; that said town was duly organized, and comprised more than two congressional townships; that the persons named as defendants in the complaint were the supervisors and town

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clerk of said town; also admitting the corporate character of the plaintiffs. The defendants answered further as follows: "The defendants, further answering, and for a defense to said complaint, allege that heretofore, and at the annual town meeting held in and for defendant town of *Fifield* for the year 1881, the electors of said town, then and there assembled, voted upon the question of collecting the highway taxes in said town in money, and did then and there decide to collect such taxes in money, by voting in the affirmative upon the following motion, to wit: 'Moved and seconded that the road tax hereafter be collected in money, as all other tax is, until this motion is rescinded;' that said motion, by the vote of said electors, was carried at said meeting, and by the adoption thereof it was decided to collect the highway taxes in money; that said vote has never been rescinded, and that the highway taxes for that year and ever since have been collected in money and at the same time and in the same manner as other town taxes, and as a substitute for and in lieu of any and all other taxes for highway purposes, including the mill tax, so called; that pursuant to said vote so passed, the electors of said town, assembled at the annual town meeting for the year 1886, voted to raise the sum of $5,000 for highway purposes; and that the said sum does not exceed the limitations now prescribed by law. Further answering, defendants deny each and every material allegation in said complaint contained, not hereinbefore specifically admitted, explained, or denied. Wherefore the defendants demand judgment against the plaintiffs for their costs and disbursements in this action."

A temporary injunction was issued on the *ex parte* application of the plaintiffs. After filing the answer, the defendants moved to dissolve the injunction. This motion was made on the pleadings and a certified statement of the aggregate valuation of the taxable property in said town. This statement shows that the value of the taxable property

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in said town for the year 1885 was $516,815.77. The motion was heard by the circuit court, and denied, and from the order denying the motion to dissolve said injunction the defendants appeal to this court.

The cause was submitted for the appellants on the brief of *M. Barry.*

For the respondents there was a brief by *Marshall & Jenkins*, and oral argument by *Mr. Jenkins.* To the point that authority to tax must be derived from some statute, they cited *Minot v. West Roxbury*, 112 Mass. 1; *Wahlschlager v. Liberty*, 23 Wis. 362. The electors of a town have no authority, either by express statute or by judicial construction of any statute, to vote a highway tax exceeding $2,000, but any amount in excess of that sum must be assessed as a mill-tax by the supervisors. Secs. 1239, 1240, R. S., as amended by ch. 163, Laws of 1883.

TAYLOR, J. The appellants insist that the circuit court erred in refusing to dissolve the temporary injunction — (1) because the complaint does not state facts which, if admitted to be true, would justify the court in granting the relief prayed for in the complaint, even if it were admitted that the electors of said town had no authority to vote a road tax upon the taxable property of said town exceeding the sum of $2,000; and (2) because the answers of the appellants show clearly that there was no intention on the part of the defendants to levy or collect a road tax in said town for the year 1886 in excess of the amount authorized by the laws of the state.

It seems to us that, unless we overrule the case of *Judd v. Fox Lake*, 28 Wis. 583, we must hold that the plaintiffs have not in their complaint stated facts sufficient to entitle them to equitable relief. In that case the complaint alleged that the electors of the town illegally voted to raise a tax of $500 upon the taxable property of the town for the pur-

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pose of graveling a street within the village of Fox Lake, and further alleged that the officers of the town intended and threatened to proceed to gravel said street in pursuance of said vote, and to expend thereon the said sum of $500 at the cost and expense of the tax-payers of the town of Fox Lake, and to draw upon and sign orders on the town treasurer for the payment of the said $500, and take any steps necessary and do any official act in furtherance thereof, etc.; that they threaten and intend to insert, or cause to be inserted, the said sum of $500 in the tax roll of said town, etc. The relief prayed in said complaint was that the defendant be enjoined from carrying said resolution into effect, and from doing any work, or expending any money, or certifying, assessing, or levying any tax, under said resolution, and in pursuance or in furtherance thereof, and that said resolution and the proceedings therein may be declared null and void, and further praying for a perpetual injunction, etc. An injunction had been issued in that case, as in the case at bar, and the defendants moved to dissolve the injunction upon a demurrer to the complaint and upon affidavits denying some of the statements of the complaint. The injunction was dissolved, and the plaintiffs appealed to this court. Upon such appeal this court affirmed the order. Some of the facts stated as appearing in said case are taken from the printed case therein, and do not appear in the report of the case. Chief Justice Dixon, in delivering the opinion of the court, says: "The motion here being equivalent to a demurrer to the complaint for want of equity or want of jurisdiction, the question presented is whether the complaint states any sufficient ground for equitable cognizance or for relief by the writ of injunction." After citing and commenting upon the cases of *Peck v. School Dist.* 21 Wis. 516, and *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167, the learned chief justice says:

"The case differs materially from all these. It is not the

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case of an apparently valid contract entered into by the officers of the corporation, but which is in reality invalid by reason of some extrinsic defect; not one of the impending unauthorized execution and delivery by the officers of negotiable paper which, in the hands of a holder for value without notice, will become valid and obligatory against the corporation; and not one where any apparent lien has been created or cloud exists upon the title to real estate. It is, supposing the resolution of the voters in town meeting to have been unauthorized and the proposed tax illegal, at most a mere anticipated or threatened invasion of the legal rights of the plaintiffs, which as yet has ripened into nothing injurious or detrimental to them at all, and perchance may never do so, but which, if it ever should, would not in its nature be irreparable, but might be redressed by the ordinary processes known to courts of law and equity. Should the officers of the town attempt to carry the resolution into effect, and assess a tax wholly unauthorized and illegal, as the complaint charges, the plaintiffs will have their action at law to recover back the money if paid under protest or on levy or distress of personal property; and if the same be extended against the real estate, they will also have their suit in equity to remove the supposed lien and cloud from their title. The complaint presents, therefore, the naked question, whether under such circumstances the aid of equity can be successfully invoked to declare in advance that certain acts of public officers, proposed or threatened in the future to be done, will, if performed, be illegal and void. We are clearly of opinion that it cannot."

I have quoted at length from the opinion in the case above cited, because it seems to dispose of one of the main questions arising in the case at bar.

The cases of *Lawson v. Schnellen*, 33 Wis. 288; *Phillips v. Albany*, 28 Wis. 340; *Lynch v. E., L. F. & M. R. Co.* 57 Wis. 430,—are all cases where the towns were about ille-

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gally to issue negotiable bonds which would be good in the hands of *bona fide* purchasers, and come within the rule stated in *Whiting v. S. & F. du L. R. Co. supra.* The case of *Nevil v. Clifford*, 55 Wis. 161, was sustained upon the allegations of fraud and collusion between the plaintiff in the judgment and the officers of the district, and it was doubtful whether the tax-payers could, in an action to avoid the tax levied to pay such judgment, attack the validity of the same. See pages 170 and 171 of report. The case of *Willard v. Comstock*, 58 Wis. 565, was an action to restrain the county officers from fraudulently and illegally appropriating the property of the county, and the action was sustained on the ground that the tax-payer had no other adequate remedy. If the authorities of the municipality fraudulently squander its property and assets, the tax-payer is irreparably injured, because it necessitates the collection of greater taxes to pay the legitimate charges against the municipality; and unless, therefore, the tax-payer can restrain the unlawful and fraudulent disposition of such property of the municipality, he is entirely remediless. None of the cases in this court, since the case of *Judd v. Fox Lake*, are in conflict with the decision in that case. The rule there laid down was approved and acted upon in the case of *Gilkey v. Merrill*, 67 Wis. 459. We think the circuit court should have dissolved the injunction on the ground that the complaint did not state facts sufficient to constitute an equitable cause of action.

We are also of the opinion that the answer of the defendants shows that there had been no substantial violation of the law in voting $5,000 road taxes on the town. The laws in force regulating the assessment and collection of highway taxes in 1886 are subd. 9, sec. 776, and secs. 1239, 1240, R. S. 1878, as amended by ch. 163, Laws of 1883. By sec. 1240, as amended by ch. 163, Laws of 1883, the board of supervisors and the electors of the town had the power to

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levy and assess upon the taxable property of the town of *Fifield* the sum of $2,000, and, in addition thereto, the further sum of seven mills upon the assessed valuation of the property of said town. The assessed value of the property of said town was over $500,000. The limit of the authority of the electors and supervisors combined to raise road taxes in said town, under any reasonable construction of the statute, would therefore exceed the sum of $5,000, viz., $2,000 voted by the town, and seven mills by the supervisors. But it is alleged by the learned counsel for the respondents that the power of the electors to vote highway taxes in said town is limited, by the proviso to said sec. 1240, to the sum of $2,000, and that any additional taxes for road purposes must be fixed and determined by the board of supervisors, and not by the electors. This is not strictly true, as the same section says the supervisors *shall* assess any amount of taxes on the property of said town, not exceeding fifteen mills on the dollar, which shall be ordered to be assessed at the next preceding town meeting. Under said sec. 1240 as amended, the electors of the town had the power to vote $2,000 as a gross sum upon the property of said town, and, in addition, the supervisors had the power to levy the sum of seven mills on the dollar valuation, making in all a sum exceeding $5,000; or, according to the construction given to these statutes by Judge BUNN in the case of *Nelson Lumber Co. v. Loraine*, 24 Fed. Rep. 456, the electors might have directed the board of supervisors to levy upon the taxable property of said town so many mills, in excess of the seven mills which they were authorized to levy without any direction, as would raise a tax not exceeding the sum of $2,000 over and above what would be raised by the seven-mill tax. In either event, therefore, there was power to collect over $5,000 road taxes in said town.

Giving a construction to these statutes most favorable to

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the tax-payer, the limit of taxation for road purposes in said town exceeded the sum of $5,000. Subd. 9, sec. 776, R. S., authorizes the electors at the town meeting to vote upon the question of collecting the highway taxes in money, "and in case it shall be decided by such vote to collect such taxes in money, such taxes for that year, and until such vote shall be rescinded, shall be collected and paid into the treasury at the same time and in the same manner as other town taxes." The answer in this case shows that the electors of said town had voted to collect the highway taxes in money, and that such vote was in full force when the electors voted to raise a highway tax of $5,000; and the answer also alleges that such vote of the electors upon the subject of highway taxes has, ever since the vote was passed to collect the highway taxes in money, been taken and considered as a substitute for and in lieu of any and all other taxes for highway purposes, including the mill tax, so called.

Under the law requiring the highway taxes to be collected in money as other taxes are collected, it seems to us very clear that the duty of the supervisors as to making out warrants for the collection of such taxes is clearly abrogated; and if any duty remains on them as a board in fixing the amount of taxes to be raised for that purpose in the town, it is simply their duty, in the absence of any vote of the electors on the subject, to declare the number of mills which shall be assessed on the valuation of the property of said town, and then the amount is to be carried out by the clerk upon the general assessment roll, and collected with the other taxes. In the case at bar the electors have indicated that all the highway taxes in said town for the year shall be $5,000. That sum the electors had the power to vote, with or without the approval of the board of supervisors, as the law gives the electors the right to direct the supervisors to raise fifteen mills on the dollar valuation,

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provided such fifteen mills does not exceed the sum of $2,000 and seven mills on such valuation. In this case the $5,000 does not exceed such sum; and if it be technically necessary that the board should, after the vote of the electors, direct so many mills on the valuation to be raised as would make the sum of the $5,000 voted by the electors, they could do that by directing that amount to be apportioned upon the assessment roll; and, according to their answer, that was all that was intended to be done in this case.

There is no equity, therefore, in staying the officers of the town in collecting a tax which the law clearly authorizes, even though some of the formalities of the law may not have been complied with. For anything appearing in this case the officers would have complied with the law literally had they not been enjoined.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with directions to that court to dissolve the injunction.

MARSHALL, Respondent, vs. HOLMES, Appellant.

March 22 — April 12, 1887.

(1, 2) Appeal to S. C.: Verdict: Evidence: Nonsuit. (3-5) Statute of limitations: New promise: Consideration: Part payment.

1. A verdict found upon evidence which is contradictory, or the credibility of which is questioned, will not be disturbed on appeal unless there is a clear preponderance of evidence against it.
2. A nonsuit is improper, where the evidence, though contradictory, will sustain a verdict for the plaintiff.
3. A debt which has become barred by the statute of limitations is yet a good consideration for a payment or a promise to pay it.

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4. Where a debtor, on being asked to pay an account, voluntarily delivers money to the creditor, without questioning his indebtedness or liability, and promises to pay more in the future, and accepts and retains a receipt for the amount as paid on account, that constitutes a completed payment; and the debtor cannot, at a subsequent time, add qualifications or conditions to such payment, so as to avoid its effect under the statute of limitations.
5. An unconditional, unqualified, and unequivocal part payment of a debt, voluntarily made by the debtor or by any person legally liable to pay it, after such debt has become barred by the statute of limitations, is sufficient evidence of a new or continuing contract to revive and take such debt out of the statute; and such a payment by one joint debtor has that effect as against him.

APPEAL from the Circuit Court for *Price* County.

The case is sufficiently stated in the opinion.

For the appellant there was a brief by *Cate, Jones & Sanborn*, and oral argument by *Mr. Jones:* The lapse of time fixed by the statute of limitations destroys the debt, and not the remedy merely. *Brown v. Parker*, 28 Wis. 21; *Carpenter v. State*, 41 id. 36; *Pierce v. Seymour*, 52 id. 272. And a debt so barred is no consideration to support a payment or a new promise. Payment of a part, after a debt is so extinguished, accompanied by the words "I make you a present of it," is not equivalent to the unqualified promise to pay the debt, made within the time limited, which is required by the case of *Pritchard v. Howell*, 1 Wis. 138. An extinguished debt cannot be revived by a subsequent promise or payment. *Sigourney v. Drury*, 14 Pick. 387. This point was not involved in the case of *Engmann v. Estate of Immel*, 59 Wis. 259. For a payment to have that effect, it must be made on account of the particular debt, with intent to have it applied thereon, and be accompanied by a promise to pay the remainder. Angell on Lim. 240, 257, 267; *Brisbin v. Farmer*, 16 Minn. 215; *Davis v. Edwards*, 6 Eng. L. & Eq. 520; *Kimball v. Kimball*, 16 Mich. 221; *Chambers v. Marks*, 25 Pa. St. 296;

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Vaughn v. Hankinson's Adm'r, 35 N. J. Law, 79; *Barclay's Appeal*, 64 Pa. St. 69. The attending circumstances in this case repel the inference of a new promise. *Roscoe v. Hale*, 7 Gray, 274; *Bell v. Morrison*, 1 Peters, 362; *Carroll v. Forsyth*, 69 Ill. 127.

For the respondent there was a brief by *Hudd & Wigman*, and oral argument by *Mr. Wigman*.

Orton, J. The facts, as testified to by Joseph Brown, the assignor of the plaintiff, are substantially as follows: Brown was a manufacturer and dealer in saddles, harnesses, robes, blankets, etc., and between the 3d day of December, 1872, and the 24th day of February, 1875, sold to the firm of Holmes & Thompson, of which the defendant was a partner, goods to the agreed amount of $403.13. Nothing had been paid on this account until the 24th day of September, 1882, when the defendant paid him (Brown) $20, and said he would let him have $20 *now*, and, if he had good luck in lumbering the next winter, he would pay him half if not the whole claim. This payment was made at Ogema, and out of doors between the barn and store of the defendant. They then went into the store, and Brown handed the defendant a receipt, which he took, saying he did not want a receipt and he would make him a present of that. Brown said, "You may as well take the receipt, because I don't want you to pay it twice over." The defendant then took the receipt and put it in his pocket. He did not tell Brown that he did not owe him anything. Brown, as a witness, was asked how the receipt was drawn, and, this being objected to by the defendant's counsel, a formal demand was then made upon the defendant for its production, who said: "We cannot comply with the demand, as we have never had such a thing in our possession." Brown then stated that the receipt was: "Received of *B. M. Holmes* $20, on account." The defendant and Thompson

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had dissolved their copartnership, and the defendant had assumed to pay the debts, and at one time agreed to give Brown his note for this account. The account was sold and transferred by Brown to the plaintiff about the middle of February, 1884, before the commencement of this suit; and soon thereafter the defendant, in conversation with the plaintiff, and when the payment of the account was demanded by him, refused to pay it. The plaintiff then said, "You paid $20 on it;" and the defendant said, "Yes, I paid $20." The plaintiff then said, "Well, that renews the account." The defendant then said, "Well, I gave it to him."

This is the case as made by the plaintiff, and thereupon the defendant's counsel moved for a nonsuit, which was refused, and this is the first exception. The defense relied upon was the statute of limitations of six years, and this payment was made after it had run upon the account. I have made a full statement of the facts shown by the plaintiff's evidence, because the decision of the motion for a nonsuit disposes of the case upon its merits; for, if the jury had a right to find for the plaintiff on these facts alone, we could not disturb the verdict, no matter how strongly they may have been contradicted or disputed by the testimony for the defendant. When the evidence is contradictory, or its credibility is in question, it is the peculiar province of the jury to decide, and unless there is a clear preponderance of the evidence against the verdict it will not be disturbed. We cannot find that there is any preponderance of the evidence against the above facts, after giving due weight to the testimony on behalf of the defendant. The case may therefore as well be determined on the motion for a nonsuit. The learned counsel of the appellant contends that a payment upon a debt already barred by the statute will not extend or again set in operation the statute for another six years, however unconditional or unqualified it may be; and challenges the decision of this question in *Engmann v. Estate of*

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Immel, 59 Wis. 249, as not being properly in that case. It was conceded in the opinion in that case that this question might not be strictly in the case; nevertheless this court saw fit to decide it, as being necessarily involved in the construction of the statute. We can see no good reason for reproducing here the reasons there given or the citations of authority there made, and need only say that if the decision of this question in that case was extrajudicial we will now give it the impress of authority by adoption, and say, in brief, that we are of the opinion that an unconditional, unqualified, and unequivocal part payment, voluntarily made by the debtor or any person legally liable to pay it, of a debt already barred by the statute of limitations, is sufficient "evidence of a new or continuing contract, whereby to take the cause out of the operation of the statute of limitations."

As we understand the statute, the "effect" of such a payment as is mentioned in sec. 4247, R. S., is the same in all respects as that of an acknowledgment or promise in writing signed by the party to be charged thereby, mentioned in sec. 4243, R. S. The provisions as to joint contractors, etc., following each of said sections, in secs. 4244 and 4248, are substantially alike; and the condition or proviso in sec. 4247, that no memorandum or indorsement by the party to whom such *payment* is made "shall be deemed sufficient proof of the payment, *so as to take the case out of the operation of the provisions of this chapter*" (or of the statute of limitations, which is the same thing), shows conclusively that payment shall have exactly such an effect. But a reference to the above case is sufficient on this question.

The remaining question is, Do these facts show such a payment? When the payment was made by the defendant and received by Brown, the then owner of the account, nothing was said, except the defendant promised to pay the half or the whole of the remainder of the account if he had good

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luck in lumbering the coming winter. The payment as such was finished and complete. What the defendant said afterwards in the store, about making Brown a present of the $20, may have been a prudential after-thought, but he nevertheless accepted and pocketed the receipt for the $20 *on account.* After the payment of the $20, and the promise to pay more afterwards, without questioning his liability or denying the indebtedness, if any length of time elapsed afterwards it was too late for the defendant to add qualifications or conditions to such payment, so as to avoid its effect under the statute. The length of time would not be material, if the payment was completed and was at the time unqualified. If the offer of the $20 payment or the payment had been preceded or accompanied by the qualification or condition that it was to be received as a *gift*, and not as a payment on the account, Brown might, and probably would, have refused it. But he received it as a payment on the account, and had no chance to reject it as a gift. Suppose the case had been reversed, and the account had not been barred by the statute, and the defendant had paid precisely in this way $20 upon it, could Brown, even a short time afterwards, have said, "I accepted that $20 as a *gift*, and not as payment on the account," or would that have qualified the payment? The effect of the defendant's subsequent statement that he made Brown a present of the $20 is destroyed by his accepting and pocketing the receipt for it *on account.* We think that the case made by the plaintiff was sufficient to entitle him to a verdict, and that the motion for a nonsuit was properly overruled.

The defendant, as a witness, gave an entirely different version of the matter. He testified that Brown came to him, and said that he had lost his property, and was poor, and had borrowed money to come there; "and wanted him to pay him something on the account." He told him he owed him nothing, and claimed that part of the account

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belonged to Thompson individually, and that he had paid his part of it. He then testified as follows: "I pulled out a $20 gold piece and handed it to him, and told him I would give it to him to help him along that much. That occurred by the steps that were near the store steps, I think." The defendant testified, further, that he never had any such talk with Brown as he testified to; that he never agreed to pay him anything, and, when he told him that he would make him a present of the $20, he said he would send him a receipt after he got home. It will be observed that the defendant testified that Brown "wanted him to pay something on the account, and that he then pulled out a $20 gold piece, and handed it to him and told him he would give it to him to help him along *that much*, and he claimed that he had paid his half of the account." This occurred when they were out doors, by the lower or some steps near the store steps. This evidence would not seem to be inconsistent with Brown's testimony that the defendant said he would let him have $20 *now*, and would pay him more the next winter. Letting him have $20 *now* is very much like giving him $20 to help him along *that much*. But the most that can be said about the evidence is that it was contradictory and depended very much upon the credibility of the defendant and the witness Brown. There is no such preponderance of the evidence in favor of the defendant as would justify a disturbance of the verdict. The learned counsel of the appellant claims that the verdict was for too much, because, according to the testimony of Brown, at least about $19 of the account sued upon was the individual debt of Thompson. The testimony of Brown was that the defendant and Thompson had dissolved their copartnership, and that the defendant had assumed to pay all the debts. But, besides this, the court instructed the jury that if they found for the plaintiff, their verdict would be for

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the balance of the principal claim of $383.13, and interest thereon from September 14, 1882, at seven per cent. per annum. This instruction was not excepted to, nor was the attention of the court called to the fact that such $19, which was included in the charge, was not the debt of the defendant, and there was no such claim asserted when the $20 was paid on the account.

Perhaps, out of deference to the able and distinguished counsel of the appellant, his ingenious but specious argument, based upon several decisions of this court in respect to the effect of the statute of limitations after it has fully run upon the cause of action thereby barred, ought to have further notice. He claims that this court has repeatedly held that such effect is *to utterly destroy the right itself and extinguish the debt*, and argues that, if so, there is no consideration left to support a new contract or continuance of the obligation by *payment* of a part of the debt. Such payment has the same effect as a promise in writing, as we have shown; and it might therefore be answered that neither is there any consideration to support such written promise; and the learned counsel cites authorities that a promise in writing might have such effect. The *right* of action may be destroyed by the statute having run upon the *cause* of action, and the *debt* may be extinguished thereby; yet the original consideration — that is, the goods sold and delivered to the defendant — still remains as an existing fact, and will remain until it is paid. The debt as a *legal* obligation may be extinguished, but the debt as a moral obligation remains. This is sufficient to give logical as well as legal effect to the statute. But it is no legitimate inquiry of the courts as to whether any particular statute is consistent with one theory or another, or any theory. It is sufficient that the statute giving such effect to an unconditional and unqualified payment upon a debt

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as still existing is plain and can have no other construction. We can find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

See note to this case in 32 N. W. Rep. 686.—REP.

BRICKLEY and another, Respondents, vs. WALKER, Appellant.

March 22 — April 12, 1887.

(1, 2) Appeal to S. C.: Instructions to jury. (3, 13–15) Conversion: Chattel mortgages: Pleading. (4–11) Debtor and creditor: Fraudulent conveyances: Husband and wife: Evidence: Burden of proof. (12) New trial: Newly discovered evidence.

1. The mere refusal of the court to state certain facts to the jury, though they were undisputed, is not ground for a reversal of the judgment.
2. The refusal to give an instruction asked is not ground for a reversal of the judgment, if it was substantially given in the general charge.
3. The attachment by an officer of chattels not belonging to the attachment debtor, and his marking them, and thus assuming and retaining control over them, and subsequently asserting and justifying his seizure and possession under the attachment, is a conversion thereof.
4. Deeds and contracts for land, running to a married woman, are *prima facie* evidence of her title to the land and to the timber cut therefrom, as against her husband's creditors.
5. Policies of insurance upon lumber in the names of a wife and daughter are admissible in evidence, in an action by them for the conversion of such lumber by attaching creditors of the husband and father, as tending to show that they treated the property as their own.
6. Evidence to show the sources from which the wife and daughter acquired money, with which to buy land or timber from which such lumber was made, is admissible in such action.

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7. Evidence is not admissible in such action to show that accounts relating to contracts with the plaintiffs were kept by the other contracting parties in the name of the husband and father, unless the plaintiffs' knowledge of or acquiescence in their being so kept is also shown.
8. Where a wife claims title to property seized on execution against her husband, even though by conveyance from him to her, the burden of proof is upon her merely to show that she purchased for a valuable and adequate consideration paid out of her separate estate, or by some other person for her; and the burden of proving the conveyance to have been in fraud of the husband's creditors is upon such creditors.
9. The fact that a husband is insolvent does not preclude him from paying to his wife a valid debt, due from him to her for money loaned, thus preferring her to other creditors.
10. A wife may lawfully contract with a firm of which her husband is a member, to run a boarding house for them for a stipulated share of the profits, and the share so earned by her will be her separate estate.
11. A wife may lawfully purchase land and cut and dispose of the timber thereon in her own name, using her husband as her agent, and the proceeds will not be subject to the claims of her husband's creditors, provided she so purchases with money belonging to herself and not belonging to or derived from her husband.
12. Newly discovered evidence upon points not involved in the issues of the case, nor capable of being determined on the new trial, is not sufficient ground for granting a new trial, though it may entitle the party to some other relief.
13. A mortgagor of chattels may maintain an action for the conversion thereof against any one not claiming as or under the mortgagee.
14. A complaint which is not demurred to, except by objection to evidence at the trial, must be liberally construed.
15. A complaint which alleges the plaintiff's ownership of chattels, their value, the unlawful conversion and disposition of the same by defendant to his own use, to plaintiff's damage, will be held good after a trial in which the title was put in issue and fully tried and a verdict rendered for plaintiff, notwithstanding it fails to allege the plaintiff's possession or immediate right of possession.

APPEAL from the Circuit Court for *Portage* County.

The case is thus stated by Mr. Justice CASSODAY:

Action in trover. May 14, 1885, the defendant, as sheriff, seized the lumber in question, a part being at Runkel's mill,

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and the rest at Brickley's mill, so called, all in Eau Plaine, Portage county, and then appraised at $5,545.38, as the property of Benjamin Brickley, on an attachment in a suit against him and in favor of one Andrew Wilson upon a note of $1,210 and interest at ten per cent. from March 10, 1882. September 12, 1885, the plaintiffs, claiming to be the owners of said property at the time of said seizure, commenced this action against the sheriff for damages by reason of the alleged unlawful seizure and conversion of said property. The defendant, answering, justified under such attachment. At the close of the trial, and on March 4, 1886, the jury returned a verdict in favor of the plaintiffs for the sum of $4,140.23 damages. From the judgment entered thereon the defendant appeals.

For the appellant there were briefs by *Houghton & Haddock* and *Chas. W. Felker*, and the cause was argued orally by *Mr. Houghton* and *Mr. Felker*. They contended, among other things, that plaintiffs could not maintain this action because they had neither alleged nor proved possession or the right to immediate possession. 1 Chitty Pl. (16 Am. ed.), 181; 2 id. 619; *Winship v. Neale*, 10 Gray, 382; *Clark v. Draper*, 19 N. H. 419; *Ames v. Palmer*, 42 Me. 197; *Caldwell v. Cowan*, 9 Yerg. 262; *Ayres v. French*, 41 Conn. 142–150; *Bloxam v. Sanders*, 4 Barn. & C. 941; *Gordon v. Harper*, 7 Term, 9; *Holmes v. Bell*, 3 Cush. 322; *Pain v. Whittaker*, 21 Eng. C. L. 390. Nor could they do so, being mortgagors of the property. *Appleton Iron Co. v. Brit. Am. Ass. Co.* 46 Wis. 23; *Cline v. Libby*, id. 123; *Woodruff v. Halsey*, 8 Pick. 333; *Coles v. Clark*, 3 Cush. 399; Jones on Chat. Mort. secs. 426, 440; *Goodrich v. Willard*, 2 Gray, 203; *Leach v. Kimball*, 34 N. H. 568. The defendant could show title in the mortgagees. *Dawes v. Peck*, 8 Term, 330; *Schermerhorn v. Van Valkenburgh*, 11 Johns. 529; *Kennedy v. Strong*, 14 id. 128; *Rotan v. Fletcher*, 15 id. 207; *Smoot v. Cook*, 3 W. Va. 172; *Glenn v. Garrison*, 17 N. J. Law, 1;

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Rose v. Coble, Phil. (N. C.) Law, 517; *Clapp v. Glidden*, 39 Me. 448, 451; *Aikin v. Buck*, 1 Wend. 466; *Ribble v. Lawrence*, 51 Mich. 569. It was error to exclude evidence and refuse instructions as to fraud in the transactions between husband and wife. *Clark v. Vorce*, 19 Wend. 232; *Ellis v. Short*, 21 Pick. 142; *F. & M. Bank v. Whinfield*, 24 Wend. 419; *State Bank v. Dutton*, 11 Wis. 371; *Richards v. Noyes*, 44 id. 609; Bump on Fraud. Conv. 579, 585, 588, 601; *Kalk v. Fielding*, 50 Wis. 339; *McKee v. Gilchrist*, 3 Watts, 230; *Benham v. Cary*, 11 Wend. 83; *Wausau Boom Co. v. Plumer*, 35 Wis. 274; *Roebke v. Andrews*, 26 id. 311.

For the respondents there was a brief by *Raymond & Haseltine*, and oral argument by *Mr. Haseltine*. The allegation of ownership was in effect an allegation of right of possession. *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *Davis v. Cincinnati*, 36 Ohio St. 24; *Googins v. Gillmore*, 47 Me. 9; *Welch v. Whittemore*, 25 id. 89; *Ayer v. Bartlett*, 9 Pick. 156; *Forbes v. Parker*, 16 id. 462; *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Gordon v. Harper*, 7 Term, 12; *Howard v. Farr*, 18 N. H. 457. The objection, if any, was waived by its not being specifically taken to evidence showing right of possession. *Bowman v. Van Kuren*, 29 Wis. 209. As to the right of a mortgagor having a right of possession to maintain the action, see *Cline v. Libby*, 46 Wis. 123; *Letcher v. Norton*, 5 Ill. 578; *Sherman v. Clark*, 24 Minn. 37; *Hall v. Sampson*, 35 N. Y. 274.

CASSODAY, J. The merits of the controversy were involved in the question whether the lumber attached was, at the time, the property of the plaintiffs, or in fact the property of Benjamin Brickley. The verdict rendered necessarily found it to be the property of the plaintiffs. Such verdict is challenged as not being supported by the evidence. It must be confessed that there are suspicious circumstances connected with the alleged acquisition of title by the plaint-

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iffs. The plaintiff *Augusta Brickley* is the wife of Benjamin Brickley, and the other plaintiff, *Sarah C. Brickley*, is their daughter. In 1875, Benjamin Brickley was in good circumstances. His mill interest at Brickley was worth $3,000, and, besides, he owned five or six hundred acres of good pine lands. In 1879 he was in partnership with one Otto, doing business at the Brickley mill. In that year, Benjamin being deeply insolvent, Otto sold out his interest in the mill and business to Segelke, Kohlhous & Co., then doing business at La Crosse, and who seem to have acquired title to the whole property and thereafter conducted the whole business at Brickley mill. About the same time Benjamin became a silent partner in that firm, and continued such until his interest was sold to Thomas Petty in 1882, from which time the proprietors of the mill and business at Brickley were known as Segelke, Petty & Co. On the part of the plaintiffs there is evidence tending to prove, in effect, that May 12, 1875, *Augusta* obtained $300 from her father's estate, and then loaned the same to her husband; that in 1874, and when *Sarah* was sixteen years of age, she went to teaching school in different parts of the country, and in doing so accumulated a little property; that October 27, 1877, a contract was made by her, or in her name, with Hungerfords, for forty or fifty acres of land, and for which she paid some $300; that during the years 1877–79, she caused logs to be taken from that land and sawed by Otto & Brickley at the Brickley mill, and sold the lumber at a profit; that during the years 1879–80 *Augusta* boarded the hired men of Segelke, Kohlhous & Co. at Brickley, under a contract with them whereby she was to have one half of the net profits, and that she received from them under that contract, as such profits, $768.45; that about the same time she received from her husband the $300 loaned him in 1875, and interest, amounting to $465; that about the same time *Augusta* let *Sarah* have $1,200; that about the same time *Sarah* and

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one George Attenburg bought of the Ringles the pine timber on some 440 acres of land,—she paying for her share some $1,700; that from her share of the pine on the Ringle lands she sold large quantities of logs, and had large quantities manufactured into lumber by Segelke, Kohlhous & Co., receiving therefrom large profits; that November 25, 1881, *Augusta* bought 160 acres of pine lands from Gerhart, paying therefor $300, which was received by her from *Sarah*; that October 11, 1882, *Augusta* bought of Hanchetts 160 acres of pine lands, paying therefor $250; that from the lands so bought by *Augusta* large quantities of logs were taken by her and manufactured into lumber and sold, and from which she realized large profits; that October 29, 1883, *Sarah* contracted with Powell for forty acres of pine land, and from which logs were taken by her and manufactured and sold; that from July 25, 1883, to October 25, 1883, *Augusta* had insurance upon lumber piled in the yard, and coming from such lands, to the amount of $3,000; that from May 13, 1884, to August 13, 1884, *Augusta* had insurance upon lumber piled in the yard, and coming from such lands, to the amount of $4,200; that *Augusta* and *Sarah* never had any settlement; that the lumber attached in this action came from their respective lands, or was purchased by them or in their name; that in making such purchases, getting in such logs, manufacturing such lumber, and selling the same, Benjamin generally acted as the agent of his wife and daughter respectively, and received from them compensation for such service. We cannot go into the details of the evidence, nor any seeming conflict or inconsistencies. While there are some suspicious circumstances connected with the acquisition of title, yet we do not feel authorized to hold, as a matter of law, that such titles were so acquired with the intention of hindering, delaying, or defrauding the creditors of Benjamin Brickley. On the contrary, we must hold that the evidence is sufficient upon the merits to sustain the ver-

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dict. This brings us to the consideration of the numerous errors assigned.

1. Was the complaint sufficient? Where there is no demurrer to the complaint, and its sufficiency is first raised by objection to evidence at the trial, it must be liberally construed. So construed, we must hold this complaint sufficient. It alleges the ownership of the property by the plaintiffs, and its value, the unlawful conversion and disposition of the same by the defendant to his own use and to the damage of the plaintiffs. The title was put in issue and fully tried upon the merits. We cannot disturb the verdict merely by reason of the failure to allege that the plaintiffs were at the time in possession or entitled to the immediate right to the possession. An allegation of ownership, under such circumstances and after such verdict, must be deemed to include the immediate right to the possession.

2. The insurance policies on lumber in the yard in 1883 and 1884 seem to have been properly admitted in evidence. Their materiality is not very apparent, it is true, but under the circumstances, and in view of the fact that the husband and father was ostensibly managing the business, we think it was not objectionable to show just how it was treated by them, respectively, during the time. At least it presents no material error.

3. For the same reasons it was competent to show the sources from which the daughter obtained the moneys with which to buy the lands or timber from which some of the lumber in question came. The same was true with respect to the wife.

4. The court properly excluded the testimony of Segelke, one of the witnesses for the plaintiffs, on cross-examination, as to the contents of the books of the firm at La Crosse in relation to the boarding-house account, and as to whether the boarding-house profits were paid or charged in those books to Benjamin, without showing the knowledge or acquies-

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cence of *Augusta* in the keeping of such accounts, or in any way connecting her with them. If her contract with the firm was valid, then no one could destroy its effect by admissions made without her knowledge or consent.

5. The same is true in respect to the exclusion of the entries in the books of Anthony Ariens, who operated the Runkel mill, respecting a saw-bill against Benjamin and his wife. The same is true respecting the account and books of Segelke, Petty & Co., of a saw-bill of part of the lumber in controversy kept by that firm in the name of Benjamin. There was no evidence tending to show the knowledge of or acquiescence in the making of such entries or accounts by either of the plaintiffs, or in any way connecting either of the plaintiffs with the making of either of such entries or accounts, except that the wife did learn that the saw-bill was run in her name for one year and after that in the name of her husband; and that, when the daughter learned that the saw-bill had been kept in the name of her father by Segelke, Petty & Co., she insisted upon having the books altered so that the account should be with her. We do not understand that the defendant was precluded from showing anything he could by legitimate evidence tending to prove an admission on the part of either of the plaintiffs to the effect that Benjamin was the real owner of any of the lumber attached.

6. The mere fact that Benjamin was insolvent at the time did not preclude him from exercising his legal right of paying his wife, in preference to his other creditors, the money which he or his firm had borrowed of her in 1875. There was no law against such preference. If the money was borrowed and repaid in good faith, then there would seem to be no valid reason for depriving her of the benefit of it; and the instructions requested, inconsistent therewith, were properly refused. The jury were, in effect,

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charged to scrutinize closely and carefully all transactions and dealings between the husband and wife. They found, in effect, that it was the repayment of a *bona fide* debt.

7. Exception is taken because the court charged the jury to the effect that the wife might as legally contract with the firm of Segelke, Kohlhous & Co. as with a stranger for the running of a boarding-house for such firm, notwithstanding her husband was at the time a member of the firm, and also for refusing to instruct to the contrary. That the wife had no power to so contract, the learned counsel for the defendant cite and rely upon *Lord v. Parker*, 3 Allen, 127, and *Edwards v. Stevens*, 3 Allen, 315. Other cases might be cited to the same effect, from the same state and others. But the statutes under which such decisions were made, were in some respects different from ours. The present statutes of Massachusetts seem to prohibit contracts between husband and wife. Secs. 2, 3, 7, 11, ch. 147, Pub. St. 1882. But in this state it was settled, even prior to the enactment of ch. 155, Laws of 1872 (secs. 2343, 2345, R. S.), that a married woman, having a separate estate, might deal with her husband respecting the same, loan him money, take a transfer of property from him in payment thereof, and buy property of him, provided the transaction was fair and honest and not in fraud of creditors. *Beard v. Dedolph*, 29 Wis. 136; *Hoxie v. Price*, 31 Wis. 82; *Breslauer v. Geilfuss*, 65 Wis. 387. The powers thus possessed by married women are greatly enlarged by the enactment mentioned. *Krouskop v. Shontz*, 51 Wis. 215, 216; *Houghton v. Milburn*, 54 Wis. 554; *Carney v. Gleissner*, 62 Wis. 497. But the objection is more specific, and goes to the nature of the contract. The contract for boarding the men did not have direct reference to the wife's separate estate. But, if she had a separate estate at the time, she could, under the law as settled in this state, contract even with her husband upon the faith and credit of that estate. Besides, the statute

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made "the *individual earnings*" of the wife, "except those accruing from labor performed for her husband, or in his employ, or payable by him, . . . her separate property," and declared the same should "not be subject to her husband's control, or liable for his debts." Sec. 2343, R. S. In addition, it gave her "all the remedies of an unmarried woman in regard to her separate property or business, and to recover the earnings secured to her" thereby. Sec. 2345, R. S. As indicated, ch. 155, Laws of 1872 (secs. 2343, 2345, R. S.), was enacted for the very purpose of enabling every married woman, though having no separate estate, to acquire one by her individual earnings, except such earnings as might accrue from labor performed by her for her husband, or in his employ, or payable by him. These exceptions are not very explicit; but when we consider the object of the enactment and the law as previously settled, we are constrained to hold that such exceptions were merely to protect the husband from liability to his wife for her ordinary services for him or the family in the household, or where she is directly employed by the husband in carrying on some business in which he is engaged, or where the nature or circumstances of her employment are such that her earnings or services are to be paid for directly by her husband, if at all. So construed, the case at bar, upon the facts as found by the jury, does not come within any of the exceptions stated. She was to have one half of the net profits, and the firm the other half. She only got such half of the profits. Had there been no such profits, she would under the contract have got nothing. As fast as such profits accrued, they became her separate estate. The firm incurred no liability to her for such services or earnings, although in case it received any part of her share of such profits, that is, of her separate estate, it might have become liable to her therefor. The firm was entitled to the repayment of all advances made. It was only such

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profits that were to be divided. The wife made the venture, depending entirely upon one half of such prospective profits for her remuneration. In the two years she succeeded in obtaining the amount stated. It might have been otherwise and she obtained nothing. We have said that the object of the enactment was merely for the purpose stated. It should be added that there was probably the additional object of preventing its abuse by committing a fraud upon the creditors of the husband by pretended payments of pretended contracts for services of the wife. But the case here made upon the facts found does not come within the prohibition or any of the exceptions. Such was manifestly the view of the statute taken by the learned trial judge. The *bona fides* of such contract and business were submitted to the jury, and by them found in favor of the plaintiffs.

8. Exceptions are taken because the court refused to give certain instructions requested, and charged the jury to the contrary, and to the effect that the logs out of which the lumber in controversy was manufactured were from lands of which the plaintiffs, or one of them, had the legal title, and that the legal title of such logs and lumber would follow and be in the legal owners of the land; that a married woman might lawfully purchase property, real or personal, and carry on business in her own name, and have, own, and enjoy the fruits thereof, the same as though she were unmarried, without interference from her husband or his creditors, but only upon the condition that the money or capital so employed be her own, and not her husband's, and obtained from sources other than and independent of her husband; that she could not take her husband's money and purchase property in her own name to screen it from the lawful demands of her husband's creditors, nor carry on his business in her name in order to prevent such creditors from reaching its products; that property thus purchased

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and business thus prosecuted in the name of the wife alone or with another, with the means of the husband and really for him, would be subject to the demands of his creditors as fully as if it were all done in his name. These instructions, taken as a whole, do not seem to be objectionable. The several deeds and contracts of lands to the wife and daughter were each and all from persons other than the husband and father, and hence were *prima facie* evidence of title in the plaintiffs, respectively. *Arndt v. Harshaw*, 53 Wis. 269. The jury were so charged in substance, with a qualification to this effect: But if it appears that such lands were purchased with the money or means of the husband, or with money or means derived directly or indirectly from the husband, and are in the name of the wife or any other person, neither she nor such other person can cover it up or keep it from the creditors of the husband, thereby to defraud, hinder, or delay such creditors in the collection of their just demands against the husband; that as to such creditors the property is the husband's and may be seized upon lawful process in their behalf, and held and sold in satisfaction of their demands against the husband, the same in all respects as if the title stood in the husband's name. Such portions of the charge were certainly favorable to the defendant.

9. Exception is taken because the court charged the jury, in effect, that the burden of proving the alleged fraud was upon the defendant. Even where the wife claims title to property seized on execution against her husband by virtue of a conveyance *from him to her*, the burden of proof is upon her only to show that she purchased the property for a valuable and adequate consideration paid out of her separate estate, or by some other person for her. That being shown, the burden of proving such conveyance to have been made in fraud of the husband's creditors is upon the party attacking the same. *Evans v. Rugee*, 57 Wis. 623. This is con-

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ceded. But it is claimed that the charge in this respect is too sweeping, as the burden was upon the plaintiffs to show that the funds with which the lands were purchased were theirs, and not Benjamin's. In view of the whole context of the charge in this respect, and portions of the charge already mentioned, we think the court did so charge in effect. In fact, under a portion of the charge mentioned, the jury were at liberty to find the legal title to the lumber in the plaintiffs or one of them, *only on condition* of their first finding that the money, means, or capital with which the lands or timber were purchased belonged to them or one of them, and not to the husband and father.

10. Exception is taken because the court, in effect, charged the jury that if the property attached was the plaintiffs' then the action of the defendant in taking, making, and thus assuming and retaining control over it, was a sufficient conversion to maintain this action. The fact that the answer justified the seizure, possession, and holding of the property by the defendant under the attachment against the husband and father, would seem to preclude the defendant from now disclaiming such seizure, possession, and holding.

11. The court was requested to instruct the jury, in effect, that if they believed "from the whole testimony that the money was, *in whole or in part*, derived from her husband or from the proceeds of her husband's estate, and that such title was so taken in her name to aid or assist in covering up her husband's property and to hinder, delay, or defraud her husband's creditors, then the plaintiffs" could not recover, and their verdict should be for the defendant. This was substantially given, whether it had respect to the whole or only a part.

12. The mere fact that *Augusta* and her husband had, March 21, 1885, given a chattel mortgage upon the lumber, or some of it, to Finch, to indemnify him and Cate against

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loss by reason of their signing an undertaking as sureties given on appeal to this court in the action of *Arians v. Brickley*, 65 Wis. 26, did not prevent the maintenance of this action against one not claiming as or under such mortgagee, but under an attachment against the property of Benjamin Brickley, and the request to charge to the contrary was properly refused. *Augusta* disclaimed any knowledge of the mortgage having been signed by her husband. By the terms of the mortgage, there was an implied right in the mortgagors to retain possession, even as against the mortgagee, until the condition should be broken. If *Augusta*, or she and her daughter, in fact owned the lumber, then they certainly had the legal right to the possession of it, notwithstanding the mortgage, as against one not claiming under such mortgagee, but under such attachment.

13. The mere refusal to state certain facts to the jury, though undisputed, is not ground for reversal.

14. Error is assigned because the court refused to set aside the verdict and grant a new trial for newly discovered evidence. This evidence is said to be the existence of a common-law lien in favor of Segelke, Petty & Co. for sawing a portion of the lumber attached. But that question was not involved in the issues in this case, as will appear from their nature as already stated. Not being in issue, the existence of such common-law lien could not have been authoritatively determined upon a retrial of such issues. *Wilde v. Paschen*, 67 Wis. 90; *Carney v. Gleissner*, 62 Wis. 493. Undoubtedly, such third persons might have been made parties, and the question as to the existence of such lien might then have been determined. *Ibid.;* sec. 2610, R. S.; ch. 41, Laws of 1883. Had they been made parties, a new and different issue would have been presented for trial. But the trial of such new issue would not have necessitated a retrial of the old issues, although its determination might have diminished the amount of the plaintiffs'

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recovery. It may be that the facts stated in the motion papers would have authorized the court to stay proceedings upon the verdict until such third parties could have been brought in, and the existence of such lien and the amount thereof authoritatively determined. But the court was not asked to do that, and the facts stated did not warrant the court in doing what was asked. Its refusal, therefore, was not error. It may be that the defendant may still be protected by an action in equity against the plaintiffs and such lien claimants. But that question is not properly before us, and of course cannot be here determined.

We have thus disposed of all the questions presented by the record. Although numerous errors were assigned and vigorously presented, yet a careful examination of each by all the four members of the court participating in the decision fails to disclose any substantial error on the part of the trial court.

By the Court.—The judgment of the circuit court is affirmed.

See notes to this case in 32 N. W. Rep. 774, 780.—REP.

THE PLANO MANUFACTURING COMPANY, Appellant, vs. FRAWLEY and another, Respondents.

March 23—April 12, 1887.

(1) Appeal to S. C.: Verdict: Evidence. (2) Promissory note: Recovery on original contract: Amendment of pleading. (3) Evidence: Rebuttal. (4) Improper remarks to jury. (5-8) Partnership: Evidence: Attorney and client: Admissions and declarations.

1. A verdict will not be set aside as against evidence, if the evidence, though conflicting and contradictory, was if believed by the jury sufficient to sustain it.

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2. A judgment will not be reversed for the refusal of the court to permit the plaintiff to recover on the original contract upon which the note in suit was founded, if he asked no amendment of the complaint to set it up.
3. This court cannot say that it was error to exclude a witness offered in rebuttal, unless the appellant told the trial court what facts he wished to prove by such witness.
4. The remarks made to the jury by defendant's attorney, in commenting upon the testimony of a witness in this case, *held* not sufficient cause for reversing the judgment.
5. In an action to charge two persons as partners upon a note executed by one of them in a firm name, parol evidence is admissible to show that, at the time of their executing a contract with the plaintiff, on which such note was based, it was understood between the parties that no partnership was formed; but not to show that one of them was not to be bound for the performance of the contract.
6. An admission made by a party to an attorney, relative to his liability on a note which he knew such attorney had in charge for collection, is not privileged, so as to be inadmissible against him in an action thereon, by reason of such party's having employed the same attorney in a matter entirely disconnected therewith, such as the collection of claims in his own favor.
7. In an action against F. and S. as partners, F. denied the partnership. S. had delivered a package of claims purporting to belong to F. & S. to an attorney, saying that directions would be found in the package. At the same time, and before the package was opened, the attorney received a telegram from F.: "Have you got F. & S. amounts to collect?" *Held*, that such telegram was not privileged as being a confidential communication between a client and his attorney.
8. If part of a conversation between a witness and a defendant is introduced in evidence by the plaintiff, the defendant may properly be permitted to testify as to the whole of such conversation, including what he himself said; but he cannot do so if the conversation was first drawn out of plaintiff's witness by him on cross-examination.

APPEAL from the Circuit Court for *St. Croix* County.

Action upon a promissory note. The principal facts are stated in the opinion. The remarks of the counsel for the defendants, therein referred to, addressed to the jury, related to one C. E. Storing, the principal witness for the

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plaintiff, who testified that he was the agent of the plaintiff and that his business consisted in making contracts and settlements for it. Such remarks were as follows: "Mr. Storing is going around the country inveigling men into just such contracts as this, and he does nothing else except in the summer time, when he goes and looks the fellows over; he is riding around the country inveigling fellows into such contracts."

For the appellant there were briefs by *Baker & Smith*, attorneys, and *Pinney & Sanborn*, of counsel, and oral argument by *Mr. Smith* and *Mr. Sanborn*. They contended, *inter alia*, that the telegram and other communications by *Frawley* to Hawkins were not privileged. 1 Greenl. Evi. secs. 239, 240; *Clay v. Tyson*, 19 Neb. 530; *Herring v. Clobery*, 1 Phil. 91; *Cormack v. Heathcote*, 2 Brod. & B. 4; Weeks on Attorneys, 255; Wharton, Evi. sec. 587. The telegram delivered to the sender is the original, and therefore the best evidence. *Saveland v. Green*, 40 Wis. 431, 442; *Trevor v. Wood*, 36 N. Y. 307; *Dunning v. Roberts*, 35 Barb. 463; *Durkee v. V. C. R. Co.* 29 Vt. 127; *State v. Hopkins*, 50 id. 316; *Smith v. Easton*, 54 Md. 138; *Taylor v. Steamboat "Robert Campbell,"* 20 Mo. 254. But the telegram was objected to and excluded solely on the ground that it was privileged, and the objection that it was not the best evidence cannot now be raised.

For the respondents there was a brief by *J. W. Bashford*, *L. P. Wetherby*, and *R. H. Start*, and oral argument by *Mr. Bashford* and *Mr. Start*. They argued, among other things, that as the contract was signed by the defendants in their individual names, evidence of what was said at the time tending to show their relations to the contract and to each other was admissible. The mere fact that they were joint obligees and apparently jointly interested in the business of the agency would not make them partners; and to show that they were not partners would not contradict the

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contract. *Edson v. Gates*, 44 Mich. 253. The relation of attorney and client existed between Hawkins and *Frawley*, and the telegram and other communications were therefore properly excluded. 18 Am. Law Reg. 76; Weeks on Attorneys, 206, 256–7, 262, 264, 267–8, 270, 271, 293–5, 307; 1 Greenl. Evi. 237; Wharton, Evi. secs. 576–7, 583; *Foster v. Hall*, 12 Pick. 89; *Moore v. Bray*, 10 Pa. St. 519; *Getzlaff v. Seliger*, 43 Wis. 297; *Sargent v. Hampden*, 38 Me. 581; *Parker v. Carter*, 6 Am. Dec. 513; *Bank of Utica v. Mersereau*, 49 id. 189; *Root v. Wright*, 84 N. Y. 72; *Beltzhoover v. Blackstock*, 27 Am. Dec. 330; *Alderman v. People*, 4 Mich. 414; *Coveney v. Tannahill*, 1 Hill, 33; *S. C.* 37 Am. Dec. 287; *Bacon v. Frisbie*, 80 N. Y. 394; *Williams v. Fitch*, 18 id. 546; *Yates v. Olmsted*, 56 id. 632. The telegram delivered to the party addressed is not the best evidence, but the original must be produced. *Burt v. W. & St. P. R. Co.* 31 Minn. 472; *Adams v. M. L. Lumber Co.* 32 id. 216; *Wilson v. M. & N. W. R. Co.* 31 id. 481; *Howley v. Whipple*, 48 N. H. 487; 1 Wharton's Evi. 76.

TAYLOR, J. The appellant brought an action against the respondents upon a promissory note for $812.34, signed "FRAWLEY & STEPHENS." The signature was in the handwriting of *Stephens*. *Frawley* answered, denying that he had signed said note, denying that *Stephens* had any authority from him to sign his name to the said note, and also denying that he was ever a partner of said *Stephens*. Upon the trial in the circuit court the jury found in favor of the defendant *Frawley*, and judgment was rendered in his favor for $67.93 costs. The defendant *Stephens* made no defense to the action. From the judgment rendered in favor of *Frawley* the plaintiff appeals to this court.

The appellant assigns as errors: (1) The admission of evidence to vary the written contract; (2) the ruling that the relation of attorney and client existed between Hawkins

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and *Frawley*, and that the telegrams and other communications by *Frawley* to Hawkins, and the documents in Hawkins' hands, were privileged; (3) in admitting the testimony as to the declarations of *Frawley* as to his liability on the contract; (4) in excluding the testimony of the witness Storing in rebuttal; (5) in allowing the defendants' counsel to address improper language to the jury; (6) in refusing to direct a verdict for plaintiff, and in refusing the instructions asked by plaintiff, and in refusing to set aside the verdict and grant a new trial.

The first assignment of error arises under the following circumstances: The plaintiff, as tending to show the liability of *Frawley* upon the note signed by *Stephens* with the name of "*Frawley & Stephens*," introduced in evidence a written contract, made between the plaintiff as one party and *John Frawley* and *M. P. Stephens* as the other party. The contract, after reciting the names of the parties, proceeds as follows: "The party of the first part, for and in consideration of the covenants and agreements hereinafter contained, to be performed by the party of the second part, has this day appointed the party of the second part agent for the sale of machines hereinafter named, extras, and twine, for the following territory and no other [specifying territory], for and during the season ending September 1, 1883; the said company reserving the right to rescind this contract, without liability for any damages, at any time when they shall be dissatisfied with the standing or mode of doing business of the party of the second part; and the party of the second part for and in consideration of the appointment to such agency, which is hereby accepted, and for the further consideration of the commissions herein named, agrees as follows [here follow conditions and covenants of the party of the second part]." This agreement was signed: "THE PLANO M'F'G CO. [Seal.] JOHN FRAWLEY. [Seal.] M. P. STEPHENS. [Seal.]"

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The note given in evidence was for an indebtedness which plaintiff claims was due to it from *John Frawley* and *M. P. Stephens*, on account of the transactions of the parties under said contract, and this fact is not denied by the respondent *Frawley*. The point at issue between the parties was whether *Frawley* and *Stephens* were partners in business under this contract, so that *Stephens* would have authority to sign *Frawley's* name to the note, or, if they were not in partnership, whether *Frawley* had authorized *Stephens* to give the note in question.

After the plaintiff had introduced the contract in evidence for the purpose above stated, the defendant *Frawley*, against the objection of the plaintiff, was permitted to state to the jury that, at the time the contract was signed, the agent of the company with whom the contract was made, in order to induce the respondent to sign the same, stated that it was a mere matter of form, and that he should not be bound in any way by the contract. The learned circuit judge, in admitting this evidence, stated that he should admit it "as bearing on the question whether the plaintiff had a right to regard him as a partner," and afterwards, in instructing the jury, he said to them: "It is admitted that the defendant *Frawley* is liable on the contract under which the machines and twine were sold and delivered by the plaintiff," meaning the machines and twine for the value of which the note was given. The plaintiff having introduced the contract as evidence of a partnership between *Stephens* and *Frawley*, we think it was competent to show that at the time of its execution it was understood by the parties that no partnership was entered into between them, but it would be incompetent to show by parol that the respondent *Frawley* was not to be bound by the contract for its performance. This was the view of the circuit judge; and, notwithstanding the appellant had stated as a witness that he was not to be bound by the contract, yet,

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when the case was submitted to the jury, with the apparent assent of all parties they were instructed that he was bound by the contract, notwithstanding his statement to the contrary. Under the charge and the limitations under which the court received the evidence, we do not think there was any error in receiving it.

It is said the court erred in refusing to admit the testimony of the witness Hawkins as to the declarations of the defendant as to his liability on the note in question, and in refusing to admit in evidence a telegram received by him from the defendant. The evidence was excluded on the ground that the communications were privileged; that Hawkins received them in his capacity as an attorney for the defendant. The evidence of Hawkins shows that he was the attorney and agent for the plaintiff in regard to their matters generally, and especially as to the note in suit; that the only employment he had for the defendant, if he had any at all, when he received the telegram, was an employment by *Stephens* to collect and apply the proceeds of certain claims placed in his hands by *Stephens*. The evidence shows that they were claims purporting to be claims belonging to *Frawley & Stephens*, and in which, upon this trial, *Frawley* claims he had no interest as a partner. His only interest, if any, was to have such claims applied upon the debt due from *Stephens* upon their contract with the plaintiff. The testimony as to the employment by *Stephens* is that he *(Stephens)* came in, apparently in haste, threw down a package of papers, saying that Hawkins would find directions in the package as to what he wanted him to do with them, and immediately left; that just at that time, and while *Stephens* was still in the office, and before the package was opened, he received a telegram from *Frawley*, the one offered in evidence and rejected by the court. The telegram read as follows: "*To S. N. Hawkins:*

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Have you got *Frawley & Stephens* amounts to collect? Let me know at once. J. FRAWLEY."

Now, it is very clear to us that there could have been no employment of Hawkins by *Frawley* at the time this telegram was sent or received by him. *Frawley* could not have made the inquiry of him in confidence as a client, because he had no knowledge of his having been employed by *Stephens*. It was a question which could not have been propounded for the purpose of obtaining legal advice in regard to any matter in which he had employed S. N. Hawkins. It was a simple inquiry as to a matter of fact, which could have no relation to any confidential matter between a client and attorney, and was therefore improperly excluded. 1 Whart. Ev. § 588; *Allen v. Harrison*, 30 Vt. 219; *Sawyer v. Birchmore*, 3 Mylne & K. 572; *Desborough v. Rawlins*, 3 Mylne & C. 515; *Spenceley v. Schulenburgh*, 7 East, 357; *Gilliard v. Bates*, 6 Mees. & W. 547.

It is also assigned as error that the court excluded the evidence of Hawkins as to what *Frawley* said as to his liability on the note in suit, after Hawkins had informed him that he was employed by the plaintiff in regard to that note and that he could not act as his attorney in respect to that claim. We think the evidence should have been admitted. Admitting that *Frawley* might have been the client of Hawkins for the purpose of collecting claims due to *Frawley & Stephens*, he was not his client in any sense in regard to the claim on the note in suit; and, after having been advised by Hawkins that he could give him no advice in regard to that matter, he was properly put on his guard; and, if he afterwards made disclosures to the attorney in regard to that claim, they were no more privileged than if made to the holder of the note, or to a mere stranger. There was no confidence between Hawkins and *Frawley* in regard to the note. See cases above cited; also, *Tucker v. Finch*,

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66 Wis. 17, 21; Weeks on Attorneys, 279, 281; *Wilson v. Godlove*, 34 Mo. 337; *Clay v. Tyson*, 19 Neb. 530; *Whiting v. Barney*, 30 N. Y. 330. Whether the papers left by *Stephens* with Hawkins were properly excluded is not decided, and whether they should have been excluded depended upon the question whether *Frawley* had any interest in them and recognizes the right of the defendant *Stephens* to employ an attorney in regard to their collections for the mutual benefit of both parties.

It is also insisted that the circuit court erred in permitting *Frawley* to testify as to what he said at a certain interview between him and one of the witnesses of the plaintiff, at the office of the defendant's attorney. Whether this evidence was admissible depends upon the question whether the conversation alluded to was introduced in evidence by the plaintiff. If the plaintiff gave evidence as to what defendant said in the particular conversation alluded to, then it would be very clear that the defendant might properly be examined as to such conversation; but, if the conversation was first drawn out by a cross-examination of a witness of the plaintiff by the defendant, then the defendant would not be entitled to examine his own client as to what he did say in such conversation. The plaintiff cannot, as a general rule, be permitted to give in evidence his own declarations, made out of court, to bolster up his testimony given on the trial. It is not clear from the printed case whether the conversation spoken of, and concerning which the defendant was permitted to testify, was introduced by the plaintiff or by cross-examination of the defendant, and we are not clear, therefore, that any error was committed in admitting the defendant's version of it as a witness in his own behalf.

We cannot say that it was error to exclude the witness Storing offered in rebuttal. There was no offer by the plaintiff to prove any particular state of facts by the wit-

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ness. To make it error to exclude a witness offered in rebuttal, it seems to us the plaintiff should have shown the court what facts he wished to prove by the witness. That does not appear to have been done in this case. The court may have thought the defendant's evidence had been of such a character as not to open the case to the plaintiff for further evidence, and the learned counsel have not shown, by their statement of the case or by their argument, that the plaintiff was clearly entitled to examine the witness in rebuttal of the case made by the defendant.

We find no error in the instruction of the court to the jury, or in his refusal to give instructions asked. The questions at issue were fairly presented to the jury by the court, and the law applicable to such issues was correctly stated by the court.

The ruling of the court in refusing to set aside the verdict as against the evidence is sustained by the evidence appearing in the record. The material facts were controverted, the evidence was conflicting and contradictory, and it was for the jury to say what credibility should be given to the testimony presented. If the evidence offered by the defendant was believed by them, they were right in giving a verdict for the defendant. It was not error, therefore, to overrule the motion for a new trial.

The question whether the court should have permitted an amendment of the complaint, so as to charge the defendants on the original contract, was not in terms presented to the court below. It cannot, therefore, be said that the court erred in not permitting the plaintiff to recover upon such contract.

The remarks made by the counsel for the defendant to the jury were not of such a character as should reverse the judgment. The advocate must be permitted some liberties in the use of qualifying adjectives and participles in com-

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menting upon the testimony of the witnesses giving testimony on the trial.

For the error in rejecting the testimony of the witness Hawkins, the judgment of the circuit court must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

See note to this case in 32 N. W. Rep. 771.—REP.

LEONARD, Appellant, vs. YOHNK and another, Sheriff, etc., Respondents.

March 23—April 12, 1887.

Bankruptcy: Discharge: Judgment obtained pending proceedings: Injunction: Jurisdiction.

1. The granting of a discharge in bankruptcy is conclusive that any delay occurring in the proceedings was sufficiently excused.
2. A discharge in bankruptcy operates to release a judgment obtained against the bankrupt, pending the bankruptcy proceedings, upon a claim which was proved or provable therein, as well as the claim itself, and the creditor cannot enforce such judgment against the bankrupt's after-acquired property.
3. Such a claim, which has been proved in the bankruptcy proceedings, does not become merged in such judgment, and the subsequent filing of the judgment is but a re-filing of the same claim.
4. A bankrupt, against whom a judgment so obtained is sought to be enforced by execution, is not bound to seek his remedy by motion for a stay of proceedings in the suit in which the judgment was rendered, as provided by sec. 5106, R. S. of U. S., but may, before obtaining his discharge, bring an action in equity to restrain proceedings on execution under such judgment; and, after obtaining his discharge, may obtain leave of court to file a supplemental complaint setting up the discharge, and obtain a perpetual injunction against such proceedings.

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APPEAL from the Circuit Court for *Eau Claire* County.

The facts will sufficiently appear from the opinion.

W. P. Bartlett, for the appellant, argued, among other things, that the plaintiff had the right to commence this action and to enjoin the defendants from enforcing the collection of the judgment in the state court. 3 Bl. Comm. 405; 1 High on Inj. sec. 296; Story's Eq. Jur. secs. 862, 874–5, 887; *Turner v. Gatewood*, 8 B. Mon. 613; *Garlick v. McArthur*, 6 Wis. 450; *Merritt v. Baldwin*, id. 439; *Brown v. Parker*, 28 id. 21; *United B. Church v. Vandusen*, 37 id. 54. If the defendant *Yohnk* had not entered judgment in the state court before proving his claim, there could not be any claim that his debt was not released by the discharge. *Thomas v. Jones*, 39 Wis. 124; *Davis v. McCurdy*, 50 id. 569; *Curtis v. Woodward*, 58 id. 499. This judgment does not constitute a new debt, and the discharge releases the plaintiff from the claim upon which such judgment was entered and from the judgment. Freeman on Judgments, secs. 244, 245; *Ruckman v. Cowell*, 1 N. Y. 505; *Clark v. Rowling*, 3 id. 216; *Monroe v. Upton*, 50 id. 593; *Blumenthal v. Anderson*, 91 id. 171; *Hubbell v. Cramp*, 11 Paige, 310; *Arnold v. Oliver*, 64 How. Pr. 452; *Anderson v. Anderson*, 65 Ga. 518; *McLendon v. Turner*, id. 577; *Harrington v. McNaughton*, 20 Vt. 293; *Downer v. Rowell*, 26 id. 397; *Root v. Espy*, 93 Ind. 511; *McDonald v. Ingraham*, 30 Miss. 389; *Bostwick v. Dodge*, 2 Doug. 331; *Stratton v. Perry*, 2 Tenn. Ch. 633; *Blair v. Carter's Adm'r*, 78 Va. 621; *Dawson v. Hartsfield*, 79 N. C. 334; *Sanderson v. Daily*, 83 id. 67; *Oliphant v. Eckerley*, 36 Ark. 69; *Widner v. Yeast*, 32 Kan. 400; *Ewing v. Peck*, 17 Ala. 339; *Imley v. Carpentier*, 14 Cal. 173; *Palmer v. Hussey*, 119 U. S. 96; *Bramman v. Snider*, 21 Fed. Rep. 871; *In re Stansfield*, 16 Nat. Bankr. Reg. 268.

T. F. Frawley and *V. W. James*, for the respondents, contended, *inter alia*, that the original debt was merged

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and extinguished in the judgment, and the judgment was not provable against the estate of the bankrupt nor affected by his discharge. This is so (1) for the reason that such merger takes effect by the rules of the common law, and (2) because the creditor, by proceeding to take judgment, is held to have elected to look to the debtor personally and to have abandoned all right to the estate of the debtor. And the debtor, on the other hand, may protect himself by moving in the court in which the action is brought against him, for a stay of proceedings until he can obtain a certificate of discharge and plead the same. If he omits to do so, but suffers judgment to go against him, he is held to have waived the right to set up his discharge against the plaintiff's claim, and the rights of the parties must therefore be governed by the judgment. *Bradford v. Rice*, 102 Mass. 472; *Sampson v. Clark*, 2 Cush. 173; *Woodbury v. Perkins*, 5 id. 86; *Faxon v. Barter*, 11 id. 35; *In re Williams*, 2 Nat. Bankr. Reg. 229; *Brown v. Morange*, 108 Pa. St. 70; *Wise's Appeal*, 99 id. 193; *In re Nebenzahl*, 9 Bened. 243; *Doe v. Childress*, 21 Wall. 642; *Cutler v. Ewans*, 115 Mass. 27; *In re Tooker*, 14 Nat. Bankr. Reg. 35; *Palmer v. Merrill*, 57 Me. 26; *Wolcott v. Hodge*, 15 Gray, 547; *In re Gallison*, 2 Lowell, 72; *Boynton v. Ball*, 105 Ill. 627; *Holbrook v. Foss*, 27 Me. 441; *Fisher v. Foss*, 30 id. 459; *Pike v. McDonald*, 32 id. 418; *Ellis v. Ham*, 28 id. 385; *Uran v. Houdlette*, 36 id. 15; *Steadman v. Lee*, 61 Ga. 59; *Evarts v. Hyde*, 51 Vt. 183; *Miller v. Clements*, 54 Tex. 351; *Burnett v. Waddell*, id. 273; *McCarthy v. Goodwin*, 8 Mo. App. 380; *Carrington v. Holabird*, 17 Conn. 530; *Ewing v. Peck*, 17 Ala. 341; *Holden v. Sherwood*, 84 Ill. 92; *In re Mansfield*, 6 N. B. R. 388; *Gould v. Hayden*, 63 Ind. 443; *Gallaher v. Michel*, 26 La. Ann. 41; 1 Herman on Estoppel, 286; High on Injunctions, 296; *Eyster v. Gaff*, 91 U. S. 521; *Burbank v. Bigelow*, 92 id. 179; *Jerome v. McCarter*, 94 id. 734; *Conner v. Long*, 104 id. 228; *Thatcher v. Rockwell*, 105 id. 467; *Hill v. Harding*,

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107 id. 631. As to the general doctrine of merger as bearing upon this case, see, also, 1 Herman on Estoppel, 559; *Ex parte Williams*, 2 Nat. B. R. 83; *Nicholl v. Mason*, 21 Wend. 339; *Town v. Smith*, 14 Mich. 348; Freeman on Judgments, secs. 215–217; *Hogg v. Charlton*, 25 Pa. St. 200; *Wayman v. Cochrane*, 35 Ill. 152; *Conn. Mut. Life Ins. Co. v. Jones*, 8 Fed. Rep. 303; *Ries v. Rowland*, 11 id. 657. That the appellant might have had a stay of proceedings until he could obtain and plead his discharge, and that failing to do so he cannot now avail himself of the discharge to defeat the judgment, see *Ruszits v. Hilliard*, 57 Vt. 60; Bump on Bankr. (9th ed.), 680; *Brown v. Stevens Co.* 52 Conn. 110; *Palmer v. Merrill*, 57 Me. 26. The plaintiff should not be granted the relief now asked, because of his unnecessary and unreasonable delay in applying for his discharge. Freeman on Judgments, 102, 502; *Brooks v. Bates*, 7 Colo. 576; *Calvert v. Peebles*, 80 N. C. 334; *Hair v. Lowe*, 19 Ala. 224; *Mastick v. Thorp*, 29 Cal. 444; *Hibbard v. Eastman*, 47 N. H. 507; *Menifee v. Myers*, 33 Tex. 691; *Yancy v. Fenwick*, 4 Hen. & M. 423; *Jevne v. Osgood*, 57 Ill. 340; *Medbury v. Swan*, 46 N. Y. 200; *Sandford v. Sinclair*, 3 Denio, 269; *Valkenburgh v. Dederick*, 1 Johns. Cas. 134; *De Sobry v. Morange*, 18 Johns. 336; *In re Ferguson*, 2 Hughes, 286.

ORTON, J. The plaintiff, by his first complaint, alleged as follows: The firm of Leonard, French & Giddings, of which the plaintiff was a member, was indebted to the defendant *Yohnk* in the sum of about $2,400, and on the 7th day of December, 1869, *Yohnk* commenced an action thereon against said firm in the circuit court of Eau Claire county. On the 13th day of December, 1869, the said firm filed their petition in bankruptcy, and were declared bankrupts accordingly, and afterwards the said *Yohnk*, with the other creditors of said firm, filed and proved said claim against the bankrupt estate, as it was provable according to the

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bankrupt law. On January 7, 1870, the said *Yohnk* obtained a judgment in the above action against said firm by default for the sum of $2,426.76, and afterwards filed and proved said judgment as a provable claim against said bankrupt estate. On the 23d day of February, 1886, *Yohnk* caused an execution to be issued on said judgment, and thereafter the said defendant *Cosgrove*, as sheriff, levied the same upon certain property belonging to the said plaintiff, and which he had acquired since the commencement of said bankruptcy proceedings, to satisfy said execution, and advertised the same for sale. On the 26th day of February, 1886, the plaintiff petitioned the bankrupt court for a discharge in said bankruptcy, and an order to show cause why he should not be so discharged was entered to be heard on the 21st day of June thereafter, and the same was duly served upon said *Yohnk*. Thereupon this action was brought by the plaintiff to enjoin the proper parties from proceeding further under said judgment and execution, and such an injunction was granted.

On the 24th day of June, 1886, the plaintiff obtained his discharge in said bankruptcy in due form of law, and thereupon, by a rule to show cause, moved the court for leave to file a supplemental complaint in said action, setting up said discharge and praying a perpetual injunction of any proceedings on said judgment and execution. In the meantime the defendants had filed a demurrer to said first complaint on the ground of want of jurisdiction and of no cause of action. Both the motion and the demurrer were heard at chambers, and the motion was denied, and the demurrer sustained. From the orders of the circuit court refusing to set aside the orders so denying the motion and sustaining the demurrer, this appeal is taken.

The facts of this case raise the question which is in such irreconcilable conflict in the state courts. In the following states it is held that by a subsequent discharge in bank-

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ruptcy, if a judgment is obtained by a creditor upon a claim provable under the bankrupt law, in an action commenced before or after the commencement of the bankruptcy proceedings, and pending such proceedings, the bankrupt is discharged from the judgment itself, the same as from the claim upon which it was founded: New York, Georgia, Vermont, Indiana, Michigan, Mississippi, Tennessee, Virginia, North Carolina, Arkansas, Kansas, Alabama, California, and perhaps some other states. In Massachusetts and Illinois and some other states it is held that such a judgment is not affected by the discharge. It is contended by the learned counsel of the respondent that many of the cases in which it is held that both the judgment and the claim are barred by the discharge arose under the bankrupt law of 1841, which did not contain the provision requiring the state court to stay proceedings in such a case before judgment, upon the application of the bankrupt, found in the bankrupt law of 1867, in sec. 5106, R. S. of U. S. But it is significant that the same conflict of decisions upon this question still exists, notwithstanding this new provision. This provision imposes a duty upon the state courts, which they may or may not discharge, notwithstanding its *imperative* language: "And any such suit or proceeding *shall* upon the application of the bankrupt *be stayed*, to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." The reason for this provision, given by the learned judge who wrote the opinion in *Boynton v. Ball*, 105 Ill. 634, was "to prevent a judgment which the discharge might not relieve the bankrupt from, as held by the courts of Maine and Massachusetts," etc. This reason evidently comes from a desire to sustain the ruling of the Illinois courts upon the main question. If there had been no conflict in the decisions of the various courts of this

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country under the law of 1841 against the rule that such intermediate judgment is not released or affected by the discharge, and all courts had agreed with the supreme court of Illinois, there might be some ground for the reason given. But when Congress must have been aware that there was a preponderance of the weight of authority in this country, and that the decisions of the English courts were uniform, against such a rule, such a reason for the provision could have had but little weight. A far better reason would have been, and probably was, that the bankrupt, after his discharge, might not be put to the trouble and expense of relieving his subsequently acquired property from the lien of, and a threatened seizure under, intermediate judgments, obtained in violation of the bankrupt law, pending his bankruptcy proceedings. This provision makes it easier and less expensive to prevent such judgments and the threatened mischief, than to set them aside after such mischief had been wrought.

It may be well to consider briefly the effect of this new provision. Under the law of 1841 the bankrupt certainly had the right to go into the state court and ask for a stay of the proceedings on the same ground, and such court had the power and discretion to stay the proceedings if there had been no unreasonable delay in obtaining his discharge. Neither the bankrupt nor the state court can do anything more now under this provision. The pendency of the bankrupt proceedings would have been no *defense* to the action then, and it is no *defense* now. The proceeding is only dilatory and discretionary at most. If the bankrupt could thereby absolutely prevent a judgment from being rendered, it would be different and quite effectual. But, as it is, the remedy is quite inadequate. There are two previous provisions that ought to be and are more effectual. The first is applicable in all respects to this case: "No creditor proving his debt or claim shall be allowed to maintain any

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suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced, or unsatisfied judgments already obtained, against the bankrupt, shall be *deemed to be discharged and surrendered thereby.*" Sec. 5105, R. S. of U. S. In this case the suit was commenced before the proof of the debt in bankruptcy. "In such a case the proving of the debt operates as a surrender, *ipso jure*, of the action, and is a *bar* to any further proceedings in the suit." Bump, Bankr. 684; *Everett v. Derby*, 5 Law Rep. 225. The other provision is as follows: "No creditor whose debt is provable *shall be allowed* to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined." [Sec. 5106.] These provisions together contain *prohibitions* against the creditor maintaining or prosecuting any such action to judgment, and it is therefore *unlawful* for the creditor to do so. Such judgments are obtained in violation of the bankrupt law. Now, what is the result if the creditor shall, notwithstanding such prohibition, maintain or prosecute such an action to judgment, or if the state court should see fit to deny, as it may, such application for a stay of proceedings? Are the judgments so obtained nevertheless valid, effectual, and conclusive? If so, then these provisions are nugatory and of no force or effect whatever. These provisions do not affect, and were not intended to affect, the jurisdiction of the state courts in such actions; but they do affect, and were intended to affect, the conduct of the creditor. He has proceeded in violation of law. As to him the judgment ought not to be effectual against the proceedings and discharge in bankruptcy. He was prohibited by the law from obtaining judgment. He is prohibited, by the spirit and effect of the same law, from availing himself of such judgment by enforcing it, by execution or otherwise, against the discharge in bankruptcy. This would seem

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to be the proper effect of these provisions. If in the event the bankrupt fails to obtain his discharge, then he is not injured. If he obtains his discharge, then he may assert it as against the judgment so unlawfully obtained.

But I have wandered sufficiently in attempting to discover the reason of the provisions. Their effect is not remedial. They cannot be interposed as a defense to the action. In view of them the state court may stay the proceedings or may refuse to do so. Not so, however, as to judgments obtained after the discharge in bankruptcy. In such cases the discharge may be pleaded in bar of the actions, or as a complete defense. That class of cases, therefore, which holds that such judgments are conclusive, is inapplicable to this case. It is conceded in the opinion in *Boynton v. Ball*, *supra*, that the English authorities are uniform upon this question that such a judgment is released by the subsequent discharge, but it is said that the English courts are forced to so hold by the provision of the English bankrupt law that if the debtor is arrested on execution he may be discharged on motion. A broader provision than that is found in the law of 1867, which is that the debtor shall not be liable to arrest in any such action (sec. 5107, R. S. of U. S.), and, if arrested, it follows of course that he may be discharged.

The legal effect of the proceedings in bankruptcy and of the discharge upon pending actions by the creditors upon proved and provable claims, and upon intermediate judgments, would seem to present a federal question, for the authoritative decision of the federal courts. I have been unable to find any case in point decided by the supreme court of the United States, except the late case of *Palmer v. Hussey*, 119 U. S. 96, in which the judgment of the court of appeals of New York, giving such effect to a subsequent discharge in bankruptcy upon an intermediate judgment of the supreme court of that state, is affirmed. That case was

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much like the present one. Hussey filed his petition on the 20th day, and was adjudicated a bankrupt on the 24th day, of January, 1868. On the 18th day of April, 1874, Palmer obtained a judgment against Hussey for about $22,000, upon a claim which was finally determined to have been provable in the bankruptcy, in a suit commenced the 7th day of September, 1868. On the 17th day of May, 1880, Hussey obtained his final discharge, and on the 12th day of June, 1880, he moved the supreme court of New York to perpetually enjoin the collection of the judgment because of such discharge. That court denied the motion, on the ground that the debt on which the judgment was obtained was not such a one as could be released by the discharge in bankruptcy. The court of appeals reversed this order, and held the judgment released, in accordance with the uniform decisions of that court since *Clark v. Rowling*, 3 N. Y. 216, after holding that such debt was one provable under the bankrupt law and which was released by the discharge, and the execution of the judgment was perpetually enjoined. On writ of error the supreme court affirmed the judgment of the court of appeals. One of the federal questions raised in the case was as to the fraudulent and fiduciary character of the debt, and the other was as to the delay in obtaining the discharge. As to the last question, the court said: "By sec. 5119 of the Revised Statutes, the certificate of discharge is made conclusive evidence, in favor of the bankrupt, of the fact and regularity of such discharge. We must presume, therefore, that the application was made within the time required by sec. 5108, or, if not, that any delay there may have been was satisfactorily explained before the discharge was granted. The certificate is conclusive on that question."

It is claimed by the learned counsel of the respondent that the question whether the judgment could be affected by the discharge according to the statute was not raised or

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discussed in the case in any of the courts. That may be, but that question was directly involved in the case, and it was probably thought useless to question the uniform decisions of the court of appeals upon it. If the supreme court of the United States entertained any different view of that question from the court of appeals, it would have been mentioned, as it would have caused a reversal of the judgment on that ground alone. That court adopted, *sub silentio*, the ruling of the courts of New York upon that question, by affirming the judgment. What was the use of disposing of the question of laches or delay in obtaining the discharge, if the discharge itself could have no such effect under any circumstances? If the counsel of the plaintiff in error in that case had supposed that the supreme court would hold differently on that question from the court of appeals, that court would have been asked to reverse the judgment on that ground, because that federal question also was directly involved in the case, and the effect of the discharge upon the judgment was involved in the question of delay in obtaining it.

In *Braman v. Snider*, 21 Fed. Rep. 871 (in the United States district court for the district of Minnesota), a case of similar facts, Judge NELSON held that "the doctrine of merger and extinguishment of the debt, and that the judgment constitutes a new debt from the time of its recovery, is not applicable under the bankrupt act." A similar decision was made by the United States district court for the district of Nevada in *Re Stansfield*, 16 N. B. R. 268.

The decisions against this effect of the subsequent discharge to release the intermediate judgment under the law of 1867 have been in part based upon the provision of the law that allows the bankrupt to apply for a continuance of the action until he obtains his discharge. It is said in one of the leading cases supporting this doctrine,— in *Bradford v. Rice*, 102 Mass. 472,— that the same proceeding was

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taken as a rule of practice under the law of 1841, and that therefore the same doctrine prevailed in many of the states under the law of 1841; and so strongly did this reason prevail in Massachusetts that in *Haggerty v. Amory*, 7 Allen, 458, in an action upon a judgment rendered in the courts of New York after the commencement of proceedings in bankruptcy under the bankrupt law of 1841, it was held that the discharge might be pleaded as a defense, because that rule of practice did not prevail in the courts of New York. This is hardly consistent with the other reason given (which is a mere fiction or technicality) for holding that the judgment is unaffected by the discharge, which is that the debt, which would have otherwise been released by the discharge, is merged or lost in the judgment, and that the judgment constituted a new debt, pending the proceedings in bankruptcy, which could not be so released. If that reason be a good one, then the judgment so rendered in New York is no more released than if it had been rendered in any other state.

The opposite rule is founded on better reasons. They are stated, perhaps, fuller and more satisfactorily in *Dawson v. Hartsfield*, 79 N. C. 334, than in any other case, and they commend themselves to our judgment. (1) The bankrupt law, and the oath required of the creditor to prove his claim, show that it is the debt itself, in whatever form or however evidenced, which is affected by the discharge. (2) The *consideration* must be inquired into in order to ascertain whether the debt is provable, or of such a nature as to prevent a discharge (as in *Palmer v. Hussey, supra)*. (3) The judgment is no more evidence of a new debt, in such a case, than a bond, promissory note, or some other evidence of debt into which the original debt was merged, and no more extinguishes the debt. It is the *date* of the demand and not the subsequent judgment on it that must determine whether the creditor was an *existing* one when an assignment or

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other transfer was made, so as to be allowed to attack it for fraud. (4) It is within the spirit and equity of the law to regard only the debt and not its form. (5) The opposite rule is narrow, technical, and absurd, and would defeat the objects of the law. These reasons are stated at length by great strength of language and by apt illustration.

In *Dresser v. Brooks*, 3 Barb. 429, it is said: "The consequence of adopting the strict and narrow construction of holding a judgment exempt from the operation of a discharge because the debt exists in a different form and under a different name would, in the case of a bankrupt whose debts were numerous, utterly defeat the benign object of the act, and leave the unfortunate bankrupt subject to a great portion of his debts after every dollar of his estate had been faithfully devoted to their payment."

It might be added to these reasons, that if one creditor whose debt was provable under the bankrupt law could bring an action on it and cause it to be so changed by a subsequent judgment upon it as to be exempt from the operation of the discharge, they may all of them take the same course, and none of them be left to give effect to the proceedings or the discharge, and the bankrupt would be defeated in trying to take the benefit of the act. And, again, if even they might be stayed in these actions upon the application of the bankrupt, he would, pending his bankruptcy, be harassed by a multiplicity of suits, here and everywhere, and suffer great expense in money and hardship and care and labor, and his whole time and attention be employed in seeking to stay the proceedings,—a trouble and embarrassment not only not contemplated, but actually *prohibited*, by the act.

It is well said in Bump's Law & Practice in Bankruptcy (6th ed.), 411: "A debt upon which a judgment has been rendered since the commencement of proceedings in bankruptcy *may be proved*. The *debt is not extinguished*. The instrument, contract, or obligation upon which the debt

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arose is extinguished, but not the debt. The debt remains. If this were not so, the judgment would destroy itself by extinguishing the very foundation on which it is built. The debt was founded on contract; it is now founded on judgment; but it is the same debt. . . . The theory that the debt is so merged as to be extinguished has no applicability under the bankrupt act."

I have referred specially to only a few of the decisions of this question cited by the learned counsel on both sides, which, however, will be preserved in their able briefs. But I think it may be safely said that the decided weight of authority, both in number and reason, is upon the side of the appellant. It being a federal question arising under a law of Congress, the above decision of it by the supreme court and other federal courts is of the highest authority, if not binding. The intimation of Mr. Justice GRAY, in *Hill v. Harding*, 107 U. S. 631, and the decisions of the circuit court for the district of Massachusetts, have clearly been induced by the uniform decisions of the courts of that state. The cases cited from the United States Reports by the learned counsel of the respondents are not applicable.

The question of delay in procuring the discharge can cut no figure in this case. That question was disposed of by the bankrupt court on granting the discharge, which is conclusive evidence that the delay, if any, was sufficiently excused. *Palmer v. Hussey, supra.* In that case there was nearly the same delay in obtaining the discharge as in pressing the judgment. In this case the plaintiff filed his bill and obtained an injunction just as soon as the defendant *Yohnk* attempted to enforce his judgment by execution, and then obtained his discharge without delay. What was said in *Dawson v. Hartsfield, supra,* is appropriate here: "Eight years have elapsed since the judgment was entered up; and if the defendant has delayed in seeking his release, the plaintiff has also waited, and made no attempt mean-

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while to enforce his judgment. *Positive* action was necessary on the part of the plaintiff; for without it no opportunity was given him. He may have supposed that the plaintiff, by his long acquiescence, was assenting to the efficient operation of the discharge in working out its proper results, and therefore no movement on his part was required. Why should there be needless litigation — and why should the defendant believe the plaintiff ever intended to enforce his debt? His conduct was reconcilable only with the idea of a silent self-adjustment, without the intervention of pleading and process. But as soon as the plaintiff wakes up and shows his intent to enforce his demand, he puts in operation the very machinery which lets in the defense."

In this case the judgment was rendered in 1870, and the execution was issued in 1886. There are peculiarities in this case that ought to be noticed. The defendant *Yohnk* filed his claim in the bankrupt court before he obtained judgment upon it. By so doing he is deemed to have waived all right of action against the bankrupt, and was not allowed to maintain any suit upon the claim, by sec. 5105, R. S. of U. S. See, also, *White v. Crawford*, 9 Fed. Rep. 371. But, not content with this submission to the bankrupt court, *Yohnk* filed his judgment also, after he had obtained it by default. The learned counsel contends, and cites some authorities to show, that the filing of the judgment was a nullity, and does not estop *Yohnk* from otherwise enforcing it. It is said by Freeman, in his tract on the Enforcement of Judgments against Bankrupts, that "the authorities preponderate in favor of the position that the taking of the judgment pending proceedings in bankruptcy does not prevent the plaintiff from proving his claim against the bankrupt estate," and the author cites many authorities to that effect. The disagreement is as to whether, in such a case, any of the costs may be included. But the effect of such filing as a waiver of his right to enforce the

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judgment upon the bankrupt's after-acquired property cannot be reasonably questioned. Such an act, in such a case, seems to me to be of the very essence of an estoppel. The creditor should not be allowed so to play fast and loose between the bankrupt court and the state court, and "blow hot and cold" in the same proceeding. *Allegans contraria non est audiendus.* The creditor in this way influences the action of the bankrupt court, and affects the rights of other creditors as well as of the bankrupt. 1 Freem. Estop. 2. But in the view we have taken of the effect of the judgment, the filing of the judgment was but a refiling and an insisting upon the same claim in the bankrupt court, and it operates as a concession that it is the same claim or debt, notwithstanding the judgment.

The only remaining material question is one of jurisdiction,—whether the plaintiff was not bound to seek his remedy by motion in the same case in which the judgment was rendered; or, in other words, whether the plaintiff had not in that way a complete remedy at law. In the first place, this objection to the action does not go strictly to the jurisdiction of the court. It is a mere rule of practice that courts of equity will not entertain jurisdiction when there is a complete remedy at law. It may be that the same remedy here sought might have been obtained by motion in that case; but the remedy need not be sought by motion, unless the facts appear on the record. If any facts are to be established by extrinsic evidence, then the suit in equity may be maintained. *McIndoe v. Hazelton*, 19 Wis. 567. In this case the whole matter of the bankruptcy and the discharge are extrinsic of the record. By the authority of that case, also, if the plaintiff has shown by his complaint that he will suffer any injustice by the levy of the execution and the sale of his property under it, he is entitled to equitable relief. It was not only proper, but necessary, that the further proceedings under the execution should be enjoined

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until the discharge in bankruptcy could be obtained, and therefore the complaint was not demurrable. It was certainly as proper to file a supplemental complaint on the happening of that event, in order to obtain a perpetual injunction of any proceedings under said judgment or other proper relief against the same. One of the objects of a supplemental bill, or a supplemental amendment of the original bill, is "when new events, referring to and supporting the rights and interests already mentioned, have occurred subsequently to the filing of the original bill." Story, Eq. Pl. 336; Mitf. Ch. Pl. 55, 61, 325.

I have given more space to this opinion, because the main questions are in conflict in other courts, and new in this court, and very important.

By the Court.—The order denying the motion to set aside and vacate the order sustaining the demurrer to the complaint, and the order denying the motion to set aside and vacate the order denying the plaintiff leave to serve the supplemental complaint, are both reversed, and the cause remanded for further proceedings according to this opinion.

MORSE, Respondent, vs. HAGENAH, imp., Appellant.

March 23 — April 12, 1887.

Partnership: Promissory notes.

1. A firm engaged, among other things, in carrying on a mill in which it holds stock, is liable upon a note, given for a loan of money to keep such mill in operation, and signed in its name by one of the partners, though he had no special authority from his copartners.
2. This is so, especially, where the firm has by its acts held out such partner to the public as clothed with authority to give notes generally in its name.

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APPEAL from the Circuit Court for *Sauk* County.

The action is upon a promissory note for $10,000, signed in a firm name by one of the copartners, and by other makers, payable to the Reedsburg Bank, and by the bank assigned to the plaintiff. *Peter Hagenah*, a member of the firm, denies that it ever executed the note or is liable thereon, and appeals from the judgment as against himself.

For the appellant the cause was submitted on the brief of *G. Stevens.*

For the respondent there was a brief by *Lusk & Bunn*, and oral argument by *Mr. Lusk.*

COLE, C. J. The defense of *Peter Hagenah* to the note in suit is that it was not given for any indebtedness or liability of the firm of Hagenahs & Geffert, and that the firm received no benefit from the consideration of the note. It is not claimed that the note was signed by him, but the firm name was signed to it by his brother John, who was the financial manager of the firm and usually executed its notes. *Peter's* contention is that he had no knowledge of the giving of the note, never assented to it, and that the note was executed for a purpose outside the partnership business, therefore he is not responsible upon it, though it was executed in the name of the firm. The firm was composed of three members,— John H. and *Peter Hagenah*, and Henry Geffert. It was engaged in a variety of businesses,—dealt in hardware, traded in agricultural implements, sold flour and feed, bought and sold grain, ran a brewery, bought and sold hops, dealt some in real estate, took stock in a woolen-mill, and was ready to do anything that there was a prospect of making money in. The firm name was signed to the note with the names of other stockholders in the woolen-mill, to raise money to carry on the mill. It is an undisputed fact that the firm of Hagenahs & Geffert owned stock in the woolen-mill. The firm thus owning stock in the mill, the learned

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counsel for the plaintiff insists, had the undoubted power to borrow money to keep the mill running, so as to protect its own property therein, even if its liability could not be sustained upon any other ground. There is great force in this view of the transaction. The making of the loan for the purpose of keeping the mill in operation would certainly seem to be for the benefit of the firm as well as other stockholders; and upon familiar principles there would be ample authority of each partner to bind the firm in making the note for such a purpose as when executing it in any other partnership business. In commercial dealings within the scope of the partnership, the acts of one partner are presumed to be for the benefit, and in the interest, of all other partners, whether present or absent, and bind the firm. *Fletcher v. Ingram*, 46 Wis. 204; Story, Partn. §§ 102–104. The defendants' counsel says that the object and purpose of the note was so far outside of the business of the firm of Hagenahs & Geffert that the mere partnership relation gave no authority, either express or implied, to sign the firm name to it; so, if *Peter* had not previously authorized it, he was no more bound by it than if the signature had been made by a mere stranger. But the answer to this argument is that it is difficult to say upon the facts that the giving of the note was outside the business of the firm; for *Peter* says the "firm went into anything we thought we saw money in." The firm took stock, as we have said, in the woolen-mill, while carrying on other branches of business. How can it be said, then, that the making of the loan to keep the woolen-mill running was foreign to the partnership matters? It would seem to be as fully within the scope of the partnership — as conducted — as running the brewery, or dealing in agricultural implements, or buying produce. The fact is, the firm did not confine itself to any particular branch of business. It engaged in any transaction or enterprise likely to be profitable.

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The learned circuit judge did not rest the liability of *Peter* upon the precise ground above indicated. He instructed the jury quite fully upon the law of partnership, and what acts of a partner bound the other members of the firm. Among other things, he said: "Each partner of a mercantile firm has authority to bind the firm within the scope of the partnership business, but, in order to bind the firm in matters outside of or beyond the scope of the partnership business, the authority of one partner to act for and bind the firm by the use of the firm name must be shown precisely the same as if any other person had performed the act. Instances of partners using the name or credit of the firm for their own personal advantage, or for matters outside of the scope of the partnership, and without authority, are constantly occurring, and where this is known to the person thus dealing with the partner who uses the firm name for his own personal benefit or for purposes outside of the scope of the business of the firm, the members of the firm not knowing or assenting to such use of the firm name will not be bound, but the member using the firm name will be bound; and it is a rule of law that, whenever a party receives the note of a firm signed with the firm name, with knowledge that the money for which such note was given or received is obtained and is to be used for purposes outside of the scope of the business of the firm, the presumption of law is that the partner who gives such note gives it, and the creditor who receives it receives it in fraud of the copartnership, and consequently the person thus dealing with the partner has no demand against the other members of the firm. . . . I will add, if a firm should hold out to the public one of their members as clothed with power generally to give notes in the name of the firm in any business he should deem advisable, the firm would be bound when such member thus held out should give a note. On the subject of assent, I will instruct you

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further, and by way of illustration, if a member of a mercantile firm should give a firm note for his personal debt, the assent or consent of his copartners to the act, or their ratification of it, may be implied from circumstances, and need not be proved by express agreement. Nor need there be any new and independent consideration for the act of the other partners ratifying or promising to be bound by the act of a copartner who has wrongfully used the partnership name for his own benefit or for purposes outside of the scope of the partnership."

Specific exceptions were taken to the last three clauses of this charge; but we do not think they contain anything prejudicial to the defendant *Peter*. It is said there is not a syllable of testimony that the firm held out to the public one of its members as clothed with authority generally to give notes in the name of the firm in any business he should deem it advisable to embark in; but, as we understand the testimony, there is abundant evidence to that effect.

Again, it is said there is not a word of testimony tending to show that notes were given by any one in transactions outside of the hardware trade, as the firm extended its business. But there is direct and positive testimony that more than one hundred notes were given to the Reedsburg Bank alone, amounting to $115,000, presumptively in the various business transactions in which the firm was engaged. Money was advanced from time to time on this paper, to which John H. had signed the firm name.

We have not noticed in detail the points made by the learned counsel for the defendant in his brief, but we think the above remarks dispose of all material objections taken by him to the proceedings on the trial.

By the Court.— The judgment of the circuit court is affirmed.

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NEW RICHMOND LUMBER COMPANY, Appellant, vs. ROGERS, Respondent.

March 23—April 12, 1887.

Taxation: Renewal of warrant: Levy.

1. The time for the collection of the taxes set down in a town tax roll may be extended by an indorsement, in proper form, upon the roll, signed officially by the town supervisors, each acting separately. The statute does not contemplate a meeting and formal action by the board, evidenced by their record kept by the clerk.
2. It is a sufficient levy of a tax warrant upon ponderous property, such as a quantity of oak plank, if the officer goes where it is and takes such control of it as is practicable without removing it, notifies the only person then upon or living near the premises where it is piled that he has levied upon it, requesting him to notify others that he had done so and that it must not be disturbed, and then posts up notices of levy and sale in proper public places.

APPEAL from the Circuit Court for *Polk* County.

The case is sufficiently stated in the opinion.

For the appellant there was a brief by *Baker & Smith*, and oral argument by *A. L. Sanborn* and *Mr. Smith*. They contended, *inter alia*, that there was no valid levy. *Libby v. Murray*, 51 Wis. 371; *Bryant v. Osgood*, 52 N. H. 185. The tax-warrant could not legally be renewed or extended by the separate action of the supervisors. 1 Dillon on Mun. Corp. (2d ed.), secs. 196–8, 379; *Day v. Jersey City*, 19 N. J. Eq. 412; *Butler v. Charlestown*, 7 Gray, 12; *Baldwin v. Canfield*, 26 Minn. 43.

For the respondent there was a brief by *F. M. Nye*, attorney, and *Gregory, Bird & Gregory*, of counsel, and oral argument by *Mr. Bird*.

ORTON, J. This is an action of trover, brought by the appellant against the respondent, for the conversion of about 16,000 feet of lumber belonging to the appellant. The facts

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are briefly and substantially as follows: The appellant owned said lumber, and it was piled up at or near its mill-yard in the town of Black Brook, in Polk county. There was on the tax roll of said town, with the usual warrant annexed thereto, a personal property tax of $130.47 against the appellant for the year 1881, which it had neglected to pay after repeated demand. One J. W. Davis was the treasurer of said town, and by virtue of said warrant he levied upon said lumber to satisfy said tax, and on notice he sold said lumber at public auction to the respondent, he having been the highest bidder for the same, and delivered said lumber to him.

A jury having been waived, upon proper findings of fact and conclusions of law the circuit court rendered a judgment against appellant of dismissal of the action. Due exceptions to the findings were taken by the appellant, and to the refusal of the court to make certain other findings in its favor. The main errors relied upon for the reversal of the judgment are that the said tax warrant was void because not renewed according to law, and the return-day thereof had expired, and that no levy thereof was ever made upon said property.

1. The renewal of the warrant was made by the three supervisors of said town acting and signing the same separately instead of as a board or body. The language of the statute (sec. 1108, R. S.) is that "the town board of any town, the board of trustees of any village, etc., and the common council of any city shall have power to extend the time for the collection of the taxes in such town," etc. "The order extending the time may be in the following or equivalent form, to be indorsed upon the warrant," etc. "We hereby renew this warrant for —— days. Dated this —— day of ——. [Signed] Supervisors of the town of ——, or mayor and clerk of the city of ——, or president and clerk of the village of ——." The indorsement on the

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warrant in question was as follows: "It is ordered and determined by the board of supervisors of the town of Black Brook, that we hereby renew this warrant for forty-five days. *Dated this 23d day of January, 1882.* [Signed] A. J. HAGDAHL, AUGUST HANSON, L. S. ANNIS, Supervisors of the town of Black Brook. Attest: J. W. DEAN, Town Clerk." We think this method and form of renewal of the warrant were strictly correct and according to the statute. The form of the order is for the supervisors each to act and sign for himself, as they did in this instance, and as appears to have been customary. This is made authority for the treasurer to act officially after the time has expired. It is indorsed upon the warrant, and becomes a part of it. The formal action of the board, evidenced by their record kept by the clerk, is not contemplated, and such action is too cumbersome and dilatory to meet the exigency of such a case. It will be noticed that the "board of trustees" of a village, and the "common council" of a city, may do this act, and yet the form of the indorsement is, "President and Clerk," "Mayor and Clerk." The form gives these officers the power to act for the board of trustees and the common council in such an emergency. That is, so it would appear; but that question is not here. This indorsement is strictly according to the form given, and is sufficient to renew the warrant. Such a disposition of this question renders it unnecessary to notice the other question as to the validity of the warrant, after the return-day thereof, as authority and justification of the officer, for the levy and sale were within the time of the extension. We do not wish to be understood as holding that when the town board is authorized to act the supervisors can act separately. It is only by this statute *proprio vigore* that such action may be had as to the extension of a tax warrant.

2. Was there a levy made upon the property? The property was white-oak plank, and ponderous, and it was certainly

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not necessary to remove it in order to constitute a seizure of it, or to take manual possession of it. It was in the mill-yard of Burkhardt's mill, near the railroad, in two piles about ten rods apart, when the levy was made. There were none of the company about there at the time. There was a man by the name of Johnson living in one of the houses on the premises, and other houses about there were vacant. The officer testified that he went there, and levied upon it and took possession of it, or, at least, as much as he could. He notified that man Johnson that he had levied upon the lumber, and requested him to notify any one concerned that he had levied upon it, and that it must not be disturbed. He at once posted up notices in three public places in the town, and one of them on the door of a vacant store on the premises, and another on a tree at a railroad depot, and the other at Corset's mill. The notices were that he had levied upon the property and that he would sell it, etc. The property was sold to plaintiff in bulk, and he took possession of it and removed it. Was this a sufficient levy? What more could the officer have done? It is answered that he might have notified the company. Such notice would not constitute the levy, it would be only that the officer had already levied upon the property. What person or persons of the company should he have notified, and how far should he travel to give such a notice? None of the company were about there at the time. If any of them had returned to that place, they would have seen the notice posted on the store building. He notified the only person occupying the premises on which the lumber was situated that he had levied. We think that he made as complete a levy and seizure of the property as he was able, or as the law required him, to make, under the circumstances. The officer fulfilled the requirements of a good levy upon such property, as laid down in *Brown v. Pratt*, 4 Wis. 513. "He was in view

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of the property, and had it under his control." He did what was held to be sufficient in *Gallagher v. Bishop*, 15 Wis. 276. He levied upon the lumber, and notified the person living on the premises of it.

We can find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

C. Aultman & Co., Appellant, vs. Case, Respondent.

March 24 — April 12, 1887.

Appeal to S. C.: Exceptions: Instructions to jury: Sale of chattels: Damages.

1. An exception to the whole of an instruction is not available on appeal, if it was in part correct.
2. In an action for the price of a reaping machine, wherein the defendant has set up its defects as a counterclaim, an instruction to the effect that the purchaser of such a machine with a warranty might recover special damages arising directly out of peculiar and exceptional circumstances affecting the agreement, such as for loss of or damage to crops and loss of time in attempting to use the machine, by reason of its not being put in condition as agreed or not being as warranted, followed by cautions as to allowing such damages, and leaving the question of their allowance to the jury, *held* not to be misleading.

APPEAL from the Circuit Court for *Sauk* County.

The case is thus stated by Mr. Justice Cassoday:

In the summer of 1882 the defendant agreed to buy of the plaintiff a self-binding reaping machine, on condition that the plaintiff would take in part payment therefor a certain old machine at $50, and upon the further condition that the defendant need not keep such machine unless it worked to his satisfaction, and that if it did not so work

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then the plaintiff was to take it back and pay the defendant for such old machine in other machinery. The machine so purchased by the defendant was used by him in the harvest of 1882, but did not work to his satisfaction, and so he declined to buy it. October 19, 1882, the parties made a new contract, whereby the defendant agreed, in consideration of said old machine and $100 cash delivered and paid to the plaintiff, and the defendant's note of $100 payable in one year without interest, to purchase said machine upon the written guaranties of the plaintiff to the effect that "we hereby guarantee to put the twine-binder bought by *Mr. Case* in good order before the working season of 1883, free of cost to him. . . . The above guaranty is intended to cover the guaranty that the machine will continue to do good work for a reasonable length of time without cost or trouble of repairing."

The defendant having failed to pay the note when due, this action was brought thereon to recover the amount thereof. The defendant answered by way of counterclaim, and alleged the breach of said agreement and warranty, and damage in consequence thereof in the sum of $400, and demanded judgment in the sum of $200, to which the plaintiff replied. On the trial the jury returned a verdict in favor of the defendant, and against the plaintiff, for $200 damages. From the judgment entered upon said verdict the plaintiff appeals.

For the appellant the cause was submitted on the brief of *J. P. Wilson*, attorney, and *E. W. Young*, of counsel. They contended, *inter alia*, that the defendant, having bought with knowledge of the defects, could not recover therefor. *Locke v. Williamson*, 40 Wis. 377; *Getty v. Rountree*, 2 Pin. 386. The damages could include only those which naturally arise from the breach, or may reasonably be supposed to have been in contemplation of the parties when the contract was made. *S. M. H. Co. v. Sturm*, 13

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Neb. 210; *Brayton v. Chase*, 3 Wis. 456; *Vedder v. Hildreth*, 2 id. 427.

For the respondent there was a brief by *John Barker*, and oral argument by *J. E. Wright*.

CASSODAY, J. The evidence was sufficient to support the verdict. There was no error in allowing a witness on the part of the defendant to testify that he saw the defendant using the binder in question in the first harvesting of 1882. The defendant had tried the machine, and knew its condition when he purchased it in October, 1882. Had he taken the machine as it then was, without exacting any agreement or warranty, he would have been without remedy. But he consented to make the purchase only upon the plaintiff agreeing to put the machine in good working order before the working season of 1883, free of cost to the defendant, and guarantying or warranting that it would then continue to do good work for a reasonable length of time without cost or trouble of repairing. This took the case out of the rule of warranty against patent defects urged by counsel. The court properly allowed the defendant to prove the breach of each of such agreements on the part of the plaintiff, and the consequent damages. The charge fully and fairly covered the whole case. No request was made for any additional instruction.

The principal errors assigned relate to the rule of damages given in the charge to the jury, and the admission of evidence in proof of them. After stating the general rule of damage in such cases to be the difference between the value of the machine as it would have been as warranted and its value as it was, the jury were told: "I will say, further, by way of illustration, that if you should find a breach, and find the machine as warranted would have been worth what it sold for, $250, and that the machine was of no value, you would give the $150 he has paid, and it would

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defeat the note. That would make up the $250, and the balance above the note would be $150, what he had paid. If you find he would have made any *profit*, you would add to $150 whatever *profit* you may find he would have made if it had been as warranted." To this, as a whole, the plaintiff duly excepted. It may be that the word "profit" was thus inaptly used, instead of loss or damage; but the exception goes to the whole quotation, a portion of which is certainly unexceptionable, and is therefore too general to be available.

Exception is taken because the court charged the jury: "Where a machine of this kind is sold with a warranty, damages in consequence of loss of grain or damage to grain by its not being put in condition that it is agreed to be put in, or not as warranted, are ordinarily regarded as too remote to be the foundation of a proper claim for damages; but if there be peculiar or exceptional circumstances affecting the agreement, then further damages may be given, if any directly arise out of those peculiar or exceptional circumstances." This was excepted to. Then, after repeatedly cautioning the jury against the allowance of special damages unless they were sustained by the evidence on the part of the defendant within the rule stated, and after stating the ordinary presumption to the effect that, upon a machine being found defective, the purchaser should immediately "supply himself with other means of securing his crops," and his duty to do so, he added: "The claim for special damages, as I will call them, is for damages to crops, and loss of time caused by delay in attempting to use the machine and give it a further trial as requested by the plaintiff or its agent. Whether the defendant ought to have any damages on that account will be for you to determine in view of the evidence and instructions which the court has given you, in case you find a breach." These are the only portions of the charge excepted to. We do not

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think they were misleading. Whether the defendant had sustained any such loss or damage by reason of any breach of such agreement and warranty was a question of fact for the jury, and properly submitted to them. The verdict was $200. This, as appears from the record and explained by the trial judge, only included $50 for such loss or damage. The evidence is sufficient to sustain such finding.

We find no error in the record.

By the Court.— The judgment of the circuit court is affirmed.

McQuade, Respondent, vs. The Chicago & Northwestern Railway Company, Appellant.

March 24 — April 12, 1887.

Contributory negligence: Pleading: Appealable order.

Plaintiff's contributory negligence may be shown under a general denial. If specially pleaded the court may order that such plea be made definite and certain or be stricken out. And such order is not appealable.

APPEAL from the Circuit Court for *Sauk* County.

The following statement of the case was prepared by Mr. Justice Taylor as a part of the opinion:

This is an appeal from an order of the circuit court requiring the defendant to make his special answer more definite and certain. The complaint sets out a cause of action against the defendant to recover damages for an injury to the plaintiff, which it is alleged was received by the negligence of the railroad company. The complaint, after alleging facts showing that the company had negligently permitted

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an engine to be used in their business which had defective steps, which the plaintiff was compelled to use in getting on and off said engine in the performance of his duty, alleged "that, in attempting to do so [that is, use the steps in descending] in a careful and prudent manner, and being so wholly unaware of the dangerous condition of said engine, said plaintiff, by reason of such defective and dangerous condition of said engine, was thrown," etc. The defendant answered, first a denial of each and every allegation in the complaint; and, for a further and separate defense, "that the alleged injury in said complaint mentioned was caused or directly contributed to by the negligence and want of care on the part of the plaintiff, and not by the neglect of this defendant or its servants."

After the answer was filed, the plaintiff moved the court "for an order requiring that the answer of the said defendant in this action be made more definite and certain by amendment, so as to show and allege which act or acts of the plaintiff are claimed by the defendant to constitute contributory negligence and want of care, and so as to show how and in what manner the alleged negligence or want of care of said plaintiff caused or contributed to the injury complained of by the plaintiff in his complaint; or that the clause of said answer attempting to set up such contributory negligence and want of care be stricken out of said answer." The motion was heard on the complaint and answer. On the hearing of the motion the circuit court ordered that the defendant, within thirty days after service of a copy of the order, amend his answer as required by the said motion, and that in case of his failure to amend the same as required by the order, that portion of the answer alleging contributory negligence on the part of the plaintiff be stricken out. From this order the defendant appeals to this court.

The cause was submitted for the appellant on the brief

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of *Jenkins, Winkler, Fish & Smith*, and for the respondent on that of *G. Stevens.*

TAYLOR, J. It has been held by this court that although the contributory negligence of the plaintiff is an affirmative defense to be made out by the defendant on the trial, such defense is admissible under a general denial, and that this is especially true when the complaint alleges that the injury happened to the plaintiff without any negligence or fault on his part. *Jones v. S. & F. du L. R. Co.* 42 Wis. 306, 310; *Cunningham v. Lyness*, 22 Wis. 245, 250; *Potter v. C. & N. W. R. Co.* 20 Wis. 533. Under these authorities, the answer, setting out affirmatively that the plaintiff's negligence was the cause of or contributed to his injury, was wholly unnecessary after pleading a general denial of all the facts stated in the complaint. If, therefore, the defendant insists upon keeping it on the record as a defense to the action, there would seem to be no reason why the ordinary rules regarding pleadings should not be applied to it by the court; and, under the decision made in *Young v. Lynch*, 66 Wis. 514, 519, it would seem the court might well direct that it should be made more definite and certain, unless the motion is met by proof that the defendant is unable to make it more definite and certain in the respect mentioned in the motion. But, whether the court was right or wrong in making the order, we are unable to see how the defendant is prejudiced by it. If he does not comply with the order it is stricken from the record, and the defendant has still all the rights upon the trial, under his general denial, that he would have with his special answer remaining on the record. The defendant not showing himself prejudiced in any way by the order appealed from, this court will not reverse the order. *Brachman v. Kuehnmuench*, 64 Wis. 249.

Appeals from orders which do not prejudice the rights of the appellant are not to be encouraged. The order in this

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case does not involve the merits of the action or any part thereof, nor does it come within any of the other provisions of the statute giving appeals from orders under sec. 3069, R. S.

By the Court.— The appeal is dismissed.

ARPIN, Appellant, vs. BURCH, Respondent.
ARPIN, Respondent, vs. BURCH, Appellant.

March 24 — April 12, 1887.

(1) Logs and timber: Cutting by mistake: Confusion: Retaking by owner. (2) Conversion: Interest. (3) Limitation of actions: Laches. (4) Parties: Assignment of cause of action.

1. If, after discovering that by mistake he has cut logs upon the land of another, a party mingles such logs with his own and floats them down the river, the owner may retake his logs, or such a quantity out of the mass as will replace his loss, in whatever place or condition they may be at the time of such retaking; and where such owner has peaceably retaken his logs he is not liable to pay to the trespasser the difference between the value of the stumpage and the value of the logs at the time of such retaking.
2. Upon recovery by the plaintiff in an action for the conversion of chattels, interest on their value should be allowed from the time they were taken.
3. A delay for more than six years in bringing a suit for the conversion of logs does not operate as a bar if the defendant was in the meantime a nonresident of the state.
4. If one of the joint owners of chattels verbally tells the other owner that if he will bring an action for the conversion thereof he may have the benefit of it, that is a sufficient assignment of the cause of action to authorize the latter to sue alone.

APPEALS from the Circuit Court for *Juneau* County.

This action was commenced in 1882 to recover damages for the wrongful conversion in 1868 and 1869 of pine logs

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belonging to the plaintiff. The facts are stated in the opinion.

For the plaintiff there was a brief by *Cate, Jones & Sanborn*, and oral argument by *Mr. Jones*. They contended, *inter alia*, that the defendant could not, by taking forcible possession of the logs innocently cut upon his land by the plaintiff, deprive the latter of the enhanced value created by his labor. The defendant was entitled only to the value of the stumpage. *Single v. Schneider*, 30 Wis. 570; *Wetherbee v. Green*, 22 Mich. 311.

G. C. Prentiss and *F. Winsor*, for the defendant, argued, among other things, that in a tort action, if the plaintiff has been guilty of laches in the prosecution of his claim, interest should be withheld. *Redfield v. Ystalyfera Iron Co.* 110 U. S. 174; *Bann v. Dalzell*, 3 Carr. & P. 376; *Newell v. Keith's Ex'rs*, 11 Vt. 214; *Adams Exp. Co. v. Milton*, 11 Bush, 49. And where there is a *bona fide* dispute as to the right to recover, and also as to the amount recoverable, interest should be allowed only from the date of the verdict. *Marsh v. Fraser*, 37 Wis. 150; *Shipman v. State*, 44 id. 458.

ORTON, J. In this case there are cross-appeals, both parties being dissatisfied with the judgment. The facts are substantially and briefly as follows: In 1868 the plaintiff had afloat in Yellow river a large number of pine logs, intended to be manufactured into lumber near the mouth of said river, and the defendant diverted a large portion of them into the boom belonging to the firm of which he was a member, near the town of Necedah, and converted the same to his own use or to the use of said firm; and it is alleged in the complaint, as another and separate cause of action against the defendant, that in 1869 the defendant obtained possession and converted in a similar way ninety-nine other logs of the plaintiff. A part of the logs so di-

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verted and converted in 1868 was cut, by a mistake of lines and boundaries, by the plaintiff, upon the lands of the defendant or of his firm. No question is made in respect to the individual ownership or conversion of said logs by the defendant, *Burch*, or to his individual liability. It was a disputed question of fact as to the number of the logs so diverted in 1868 that were cut on the lands of the defendant, and as to the number which belonged to the plaintiff, and as to the whole number so diverted, upon which there was considerable conflict of evidence. On the question as to whether the defendant diverted any of the ninety-nine logs of the plaintiff in 1869 there was also a conflict of evidence.

The referee who tried the case, and the circuit court in acting upon his report, agree that, of the logs so diverted in 1868, 81,250 feet were cut on the land of the defendant and belonged to him, and that the remainder so diverted in that year by the defendant, amounting to 52,539 feet, belonged to the plaintiff, and that the value of said logs at Necedah was $4.75 per thousand feet. Both parties are dissatisfied as to these respective amounts of the logs. We have carefully examined the evidence, and do not think that there is any clear preponderance of the evidence against these findings. It would be profitless to more specially notice the evidence, or to discuss its bearing and effect. The presumption of the correctness of these findings, from the fact that the referee is an able and a careful lawyer and heard the testimony, and that they were confirmed by so able a court, is in itself very strong.

The referee found that the defendant so diverted and converted the said ninety-nine logs in 1869. This finding was reversed by the circuit court. We do not think that the evidence that the defendant took possession of said logs, or that they were not a part of the logs taken the year before, if he did take them, was so strong and conclusive as

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to justify this court in reversing the ruling of the circuit court on these questions. It is impossible to reconcile the evidence as to these ninety-nine logs, and the plaintiff was bound to make a reasonably clear case as to them, and it is evident that he has not done so.

The other questions raised in the case for the decision of this court are:

I. On the part of the plaintiff as appellant, whether he should not have recovered, as part of his damages, the difference between $4.75 per thousand feet for the 81,250 feet of logs at Necedah, and $1.25 per thousand feet for the stumpage of the same when cut, and interest thereon, which values were so found, on the ground that they were so cut by mistake and such amount only is allowed the defendant by the statute, and that he obtained the value of the plaintiff's labor in the cutting, hauling, and driving of the same, which he was not entitled to have. There are two facts which seem to be very clear: (1) That this cutting on the defendant's land was done by mistake; and (2) that the defendant obtained *peaceable* possession of the logs. It may be properly said from the evidence, also, that the plaintiff knew, soon after the cutting was done, that he had trespassed on the defendant's land, and knew, or ought to have known, and had the best means of knowing, the logs that were so cut on the defendant's land. He should have at once tendered reparation for the same, instead of placing his mark upon the logs as his own, and mingling and confusing the same, beyond the possibility of identification and separation, with his own logs, in floating the whole mass together down the river. The defendant had the right to stop and take possession of them, or such an average number of them as would replace those he had lost. *Jenkins v. Steanka*, 19 Wis. 126; *Mowry v. White*, 21 Wis. 417; *Root v. Bonnema*, 22 Wis. 539; *Stearns v. Raymond*, 26 Wis. 74; *Single v. Barnard*, 29 Wis. 463; *Willard v. Rice*, 45 Am.

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Dec. 226, and note. After the logs had been cut by mistake on the land of the defendant, and the plaintiff had found out the mistake, he should have kept them separate, and should not have confused them by marks and floating them in the main river with his own logs. *This* was *wilful*, at least. It is true that there had been some talk between the parties about a settlement for this trespass, but nothing came out of it, and the plaintiff persisted in running off the logs. There can be no question but that the defendant had the right to retake his logs in the way he did. Having thus repossessed himself of his own property, he was entitled to them as they were. This is elementary. Had he brought an action to recover their value, his action would be governed by the statutory rule of damages. But this case, in respect to the logs found to have been the property of the defendant, is not within the statute, and must be governed by the common-law rule, re-enacted by sec. 4269, R. S., that gives him his property "in whatever place, shape, or condition, manufactured or unmanufactured, the same shall have been at the time" of its recapture.

II. On the part of the defendant as appellant, the first question is as to the right of the plaintiff alone to bring the action. His brother Antoine was equally interested with the plaintiff in the logs. But it was in evidence that he told the plaintiff if he would bring the action he might have the benefit of it, or that he might prosecute the action for his own benefit. We think this was sufficient to transfer his interest in the claim.

Second. The delay in bringing the suit is urged as being tantamount to the bar of the statute of limitations. The defendant became a nonresident of this state in 1869. This was a sufficient excuse for the delay.

Third. Was interest upon the value of the plaintiff's property properly computed from the time it was taken? We can see nothing in this case that should take it out of

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the general rule that interest should be allowed the plaintiff on the value of his property from the time it was wrongfully taken by the defendant, as laid down in *Bonesteel v. Orvis*, 22 Wis. 523.

By the Court.— The judgment of the circuit court is affirmed.

WALKER, Respondent, vs. DUNCAN, Appellant.

March 24 — April 12, 1887.

(1) Pleading: Variance: Waiver of tort. (2) Logs and lumber: Evidence of quantity.

1. A complaint alleged that the defendant was indebted for property sold and delivered to him, but the evidence showed that he wrongfully converted the property. *Held*, that the variance was immaterial, as the plaintiff had the right to waive the tort and sue upon contract.
2. Proof, by the scale and otherwise, of the whole quantity of logs which had been stored in a mill pond, together with evidence of the quantity of lumber sawed from what remained after the defendant had converted a portion of them, is admissible to show the quantity converted, although it is conceded that the saw-bill generally differs from the scale.

APPEAL from the Circuit Court for *Columbia* County.

The following statement of the case was prepared by Mr. Justice CASSODAY:

The plaintiff in his complaint alleged, in effect, that the defendant was justly indebted to him in the sum of $3,375 for 250,000 feet of saw-logs theretofore sold and delivered to the defendant by the plaintiff, and at his special instance and request. The answer was a general denial. At the close of the trial the jury returned a verdict in favor of the plaintiff for $600 damages. From the judgment thereon the defendant appeals.

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For the appellant there was a brief by *G. W. Cate*, and oral argument by *D. Lloyd Jones*. They contended, *inter alia*, that the proof did not sustain the complaint, and the variance was fatal. *Warren v. Bean*, 6 Wis. 120; *Walter v. Bennett*, 16 N. Y. 250; *Salters v. Genin*, 7 Abb. Pr. 193; 4 Wait's Pr. 695. Though the plaintiff may waive a tort and sue on contract, yet his complaint must state the facts constituting his cause of action — the facts from which he claims the law implies a promise to pay. Sec. 2646, R. S.; 2 Wait's Pr. 284, 305–6–9, 379; 1 Chitty's Pl. 215; *Supervisors of Kewaunee Co. v. Decker*, 30 Wis. 624; *Slutts v. Chafee*, 48 id. 617; *Eilert v. Oshkosh*, 14 id. 586; *Rothe v. Rothe*, 31 id. 570; *Allen v. Patterson*, 7 N. Y. 476; *Eno v. Woodworth*, 4 id. 249; *Proctor v. Reif*, 52 Iowa, 592; *Byxbie v. Wood*, 24 N. Y. 610.

For the respondent there was a brief by *Raymond & Haseltine*, and oral argument by *Mr. Haseltine*.

Cassoday, J. The defendant owned a saw-mill on Silver creek, with a mill-pond which he used for storing saw-logs. Three fourths of a mile above was another saw-mill, owned by one Palmer, with a mill-pond similarly used. In the winter of 1880–81, the plaintiff got into Palmer's mill-pond and there stored a large quantity of saw-logs belonging to himself. The evidence on the part of the plaintiff tended to prove that in a time of high water, in September, 1881, a portion of the plaintiff's saw-logs floated out of Palmer's pond into the defendant's pond, and were sawed by the defendant and converted to his own use without the consent of the plaintiff. The principal error assigned is that the cause of action thus proved was not the one alleged in the complaint, and that the variance was fatal. The cause of action alleged in the complaint is upon contract. The cause of action proved is in tort. But this court has repeatedly held that, when money or property has been tortiously con-

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verted, the owner may waive the tort, and sue and recover upon contract. *Grannis v. Hooker*, 29 Wis. 65; *Norden v. Jones*, 33 Wis. 600; *Western Assurance Co. v. Towle*, 65 Wis. 254. That is what was done here, and we must therefore regard the variance as immaterial.

To prove the amount of saw-logs thus converted, there was evidence given on the part of the plaintiff tending to prove, by the scale and otherwise, the whole amount of saw-logs he then had in Palmer's pond, and their value per thousand, and also the whole amount of lumber sawed therefrom at Palmer's mill. He claimed that the difference was the amount so converted. It is conceded that the saw-bill generally differs from the scale, so that the precise amount of the plaintiff's logs which so floated out of Palmer's pond could not be ascertained from such evidence, much less the precise amount so converted. Still it was a question of fact, and the evidence was admissible, and as certain as circumstances would permit. We cannot say that it was insufficient to sustain the verdict as to the amount so converted by the defendant. On the contrary, we must hold that the verdict is sustained by the evidence, especially as only a small portion of it is printed.

By the Court.—The judgment of the circuit court is affirmed.

SEMPLE, Appellant, vs. WHORTON and others, Respondents.
SEMPLE, Respondent, vs. WHORTON and others, Appellants.

March 24—April 12, 1887.

(1) Tax deed: Defective execution: Redemption. (2) Deed: Breach of covenants: Sale for taxes. (3) Wife joining in deed to bar dower: Liability on covenants. (4, 5) Failure of title to part of land conveyed: Measure of damages: Evidence.

1. A tax deed having but one witness, though recorded, will not give the grantee constructive possession, nor will the right of redemption be barred thereby.

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2. Land conveyed by warranty deed had been sold for taxes, but the right of redemption remained. *Held*, that there was no breach of the covenant of seizin, but at most an outstanding incumbrance, upon paying which the grantee might recover on the covenant against incumbrances.
3. A wife who joins with her husband in the execution of a deed, merely for the purpose of barring her dower, is not personally liable on the covenants in the deed.
4. Where the title fails to only a part of the land conveyed, the grantee may recover in an action on the covenants of seizin and right to convey, or upon an agreement to convey, such a fractional part of the whole consideration paid as the value, at the time of the purchase, of the piece to which the title fails bears to the value of the whole piece purchased, and interest thereon during the time he has been deprived of the use of such fractional part, but not exceeding six years. A clerical error in the attempted statement of the rule in *Messer v. Oestreich*, 52 Wis. 696 (inadvertently repeated in *Bartelt v. Braunsdorf*, 57 id. 3, and *Docter v. Hellberg*, 65 id. 424), corrected.
5. Such values may be shown by parol evidence, and are to be determined from the actual and visible conditions of the several parts at the time of the purchase, and not from the conditions then supposed to exist or contemplated by the parties.

TAYLOR, J., dissenting, is of the opinion that the rule of damages above stated is merely a general rule for determining, in ordinary cases, the amount paid for the part to which title fails, and that it should not be applied in a case where it turns out that such part is of more value than any of the other parts of the tract purchased, not on account of anything in the contemplation of the parties, but by reason of facts which neither of them knew at the time and which the purchaser did not take into consideration when purchasing or in fixing the price which he was willing to pay.

APPEALS from the Circuit Court for *Outagamie* County.

The case is thus stated by Mr. Justice CASSODAY:

This action was commenced October 8, 1885, and is based wholly upon a breach of the covenant of seizin and right to convey. November 11, 1885, the defendants gave notice of an offer to allow judgment for $210, with interest from September 12, 1883, which was rejected. The jury was waived, and the cause tried by the court May 7, 1886. October 12, 1886, the findings of the court were filed.

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It appears, in effect, from the findings and record in the case, that September 12, 1883, *William* and *John Whorton* and their wives executed and delivered to the plaintiff their warranty deed, with full covenants, for 560 acres of land, consisting of fourteen forties scattered through five different sections of a certain township, for a consideration of $1,400, then paid and recited in the deed; that at the time of the purchase there was some excitement in respect to iron being found in the neighborhood of these lands, which were then known to all parties as pine slashings, capable of being used for agricultural purposes; that the prospect of finding iron in the lands or some of them induced the purchase at the price paid; that at the time neither party had any idea that there were any improvements or improvement on any of the lands, but all supposed them to be all wild, unimproved, and uncultivated; that in the negotiations for the lands between the parties it was understood that the lands were not all of equal value, but that some were better than others; that the *Whortons* held the lands at $5 per acre if sold in separate parcels, but would sell the whole fourteen forties throughout, at $2.50 per acre, or $100 per forty, and the sale for the whole was closed on these terms; that the plaintiff got a good title to all of the lands except two forties; that upon one of these there was at the time an outstanding tax title, which the plaintiff purchased in, and paid out therefor $40, April 21, 1885; that neither of the *Whortons* had any right, title, or interest in the other forty at the time, but the same was the absolute property of one Coon, who then held the same by deed of prior date giving him the paramount and absolute right and title thereto; that this Coon forty acres was, at the time of the purchase, of the actual value of $648, of which $530 consisted of improvements, to wit, fifteen acres of clearing, a house, out-buildings, etc., and the balance, consisting of the land without such improvements, was $118; that the actual value

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of the whole fourteen forties at the time of the purchase was $952; that the wives of the *Whortons*, defendants herein, had no interest in any of the lands, except an inchoate right of dower, and they joined in the execution of the deed merely to bar the same; that the plaintiff sustained damage by reason of said breaches in the sum of $688.

As conclusions of law, the court found that *William* and *John Whorton* were indebted to the plaintiff in the sum of $685, with interest on $648 from September 12, 1883, and on $40 from April 21, 1885, making in the aggregate $829.29, for which he was entitled to judgment against them with costs; that said wives were entitled to judgment, on their separate answers, dismissing the complaint upon the merits as against them, and for costs. Both parties filed exceptions. November 24, 1886, *William* and *John Whorton* appealed from the judgment entered upon the findings, and December 11, 1886, the plaintiff also appealed therefrom.

For the plaintiff there was a brief by *E. J. Goodrick*, and oral argument by *Mr. Goodrick* and *Mr. J. T. Fish*. As to the proper rule of damages for the failure of title to a part of the land conveyed, they cited *Wager v. Schuyler*, 1 Wend. 553; *Dimmick v. Lockwood*, 10 id. 142; *Morris v. Phillips*, 5 Johns. 56; *Guthrie v. Pugsley*, 12 id. 126; *Phillips v. Reickert*, 17 Ind. 120; *Weatherbee v. Bennett*, 2 Allen, 428; *Ela v. Card*, 2 N. H. 175; *Partridge v. Hatch*, 18 id. 494; *Cornell v. Jackson*, 3 Cush. 506; Rawle on Covenants, 284–6; 2 Suth. on Dam. 276, 277; 1 Sedgw. on Dam. (7th ed.), 339; *Terry's Ex'rs v. Drabenstadt*, 68 Pa. St. 400; *Tone v. Wilson*, 81 Ill. 529; *Messer v. Oestreich*, 52 Wis. 684; *Docter v. Hellberg*, 65 id. 415; *Bartelt v. Braunsdorf*, 57 id. 1; *Willson v. Willson*, 57 Am. Dec. 320; *Hunt v. Orwig*, 17 B. Mon. 73; *Beaupland v. McKeen*, 28 Pa. St. 124; *Walker v. Johnson*, 13 Ark. 522. The oral testimony offered by the defendants on the trial was inadmissible and should have

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been excluded. *Hei v. Heller*, 53 Wis. 415; *Hooker v. Hyde*, 61 id. 204; *Kirch v. Davies*, 55 id. 287; *Steele v. Schricker*, id. 134; *Hubbard v. Marshall*, 50 id. 322; *Cooper v. Cleghorn*, id. 113; *Breed v. Ketchum*, 51 id. 164; *Ballston Spa Bank v. Marine Bank*, 16 id. 120.

Moses Hooper, for the defendants, contended, *inter alia*, that the warrantor of lands, on failure of title to a part, should respond in damages measured by the value of the lands in their supposed condition, and not measured by the actual value growing out of conditions not known to either party, and not entering into their contemplation. *Gore v. Brazier*, 3 Mass. 523, 543–4; *Park v. Bates*, 12 Vt. 389. See, also, *Bond v. Quattlebaum*, 1 McCord, 584; *Wiley v. Howard*, 15 Ind. 169, 175; *Crabtree v. Crawford*, 25 Ill. 248; *Michael v. Mills*, 17 Ohio, 601, 604; *Hoot v. Spade*, 20 Ind. 326; *Phillips v. Reichert*, 17 id. 120; *Billmeyer v. Wagner*, 91 Pa. St. 92; *Mihills Mfg. Co. v. Day Bros.* 50 Iowa, 250; *Williamson v. Test*, 24 id. 138; *Abbott v. Gatch*, 13 Md. 315; *Caswell v. Wendell*, 4 Mass. 108. The warrantor of lands, with improvements thereon not within the knowledge or contemplation of either party, in the possession of the party who made the improvements, should not respond in damages on account of the improvements. *Mason v. Kellogg*, 38 Mich. 132. The warrantor of several tracts of land conveyed by one deed, mentioning one consideration for all, but on a sale of the separate tracts each for a specific price, should respond in damages only for the separate purchase price of the parcel to which title fails. Where there is a separate valuation of each tract, evidently the law should look upon the transaction as though a separate deed had been made for each tract. *Leland v. Stone*, 10 Mass. 459, 462–3; *Harlow v. Thomas*, 15 Pick. 66, 70; *Childs v. Shower*, 18 Iowa, 261; *Coles v. Soulsby*, 21 Cal. 47. It is competent to prove by parol that the separate parcels of land conveyed by one deed for one expressed consideration, were in fact sold each

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for a separate consideration, parcel of the consideration named in the deed. *Hahn v. Doolittle*, 18 Wis. 196; *Simmons v. Cloonan*, 47 N. Y. 3; *Curtiss v. Ayrault*, id. 73; *Knapp v. Warner*, 57 id. 668; *Donlin v. Daegling*, 80 Ill. 608; *Major v. Dunnavant*, 25 id. 238; *Leland v. Stone*, 10 Mass. 459, 462–4; *White v. Miller*, 22 Vt. 380; *Buckley's Appeal*, 48 Pa. St. 491. It was also competent to prove by parol in this action the understanding of the parties as to the condition of the lands and the uses for which the same were fit and in view of which they were bought, to show that after discovered conditions, affecting their actual value, did not enter into the contemplation of the parties. *Hahn v. Doolittle*, 18 Wis. 196; *Knapp v. Warner*, 57 N. Y. 668; *Sigerson v. Cushing*, 14 Wis. 527, 548; *Wrigglesworth v. Wrigglesworth*, 45 id. 255, 258; 1 Greenl. Evi. secs. 276, 287–8; *Hall v. Davis*, 36 N. H. 569; *Emery v. Webster*, 42 Me. 204; *Donlin v. Daegling*, 80 Ill. 608; *Comm. v. Roxbury*, 9 Gray, 493; *Abbott v. Abbott*, 51 Me. 575, 581; *Harlow v. Thomas*, 15 Pick. 66; *Leland v. Stone*, 10 id. 459, 461–3; *White v. Miller*, 22 Vt. 380; *Schuyler v. Russ*, 2 Caines, 202; *Buckley's Appeal*, 48 Pa. St. 491. Married women uniting with their husbands in covenants of warranty, through the ignorance of the scrivener, where the intention of all the parties is that they shall only release dower, are not liable for damages on failure of title. R. S. secs. 2222, 2221, 2345; Rawle on Covenants, 537; 1 Bish. Law of Married Women, sec. 603; *Rosenthal v. Mayhugh*, 33 Ohio St. 159; *Childs v. McChesney*, 20 Iowa, 431; *Lyon v. Metcalf*, 12 id. 93; *Botsford v. Wilson*, 75 Ill. 133, 134; *Knox v. Brady*, 74 id. 476; *Goodenough v. Fellows*, 53 Vt. 102; *Bressler v. Kent*, 61 Ill. 426, 428; Tyler on Inf. & Cov. 615; *McCormick v. Hunter*, 50 Ind. 186, 188; *Blake v. Blake*, 7 Iowa, 46, 54, 55; *Ulp v. Campbell*, 19 Pa. St. 361, 363; *Townsend v. Brown*, 16 S. C. 91. And the facts bringing them within this rule may be proven by parol. *Hahn v. Doolittle*, 18 Wis. 196; *Garrison v. Owens*,

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1 Pin. 471; *Donlin v. Daegling*, 80 Ill. 608; *Knapp v. Warner*, 57 id. 668.

CASSODAY, J. It appears from the record that October 31, 1872, the county clerk of Shawano county executed and acknowledged a tax deed for the unpaid taxes of 1868, on the sale of 1869, purporting to convey to that county the forty acres of land, the title to which is alleged in the complaint to have been in one Andrew Vang at the time the *Whortons* purported to convey the same to the plaintiff. That deed was recorded December, 1872, notwithstanding it only had one witness. May 25, 1875, the county clerk of that county executed and acknowledged a quitclaim deed of the same land to one H. Sheldon, and the same was recorded on the same day, November 12, 1879, the said tax deed was signed under the attesting clause by another witness; but before he signed it, the person who was such county clerk in 1872, but had ceased to hold such office, asserted to such witness that he had signed it as such clerk at the time aforesaid, and such last-named witness thereupon signed as aforesaid, and the said tax deed was thereupon immediately re-recorded. October 5, 1882, one A. J. Sheldon executed a deed purporting to convey the same forty to Andrew Vang. April 21, 1885, Andrew Vang and wife executed a deed purporting to convey the same forty (and four others not involved in this action) to the plaintiff, for which the plaintiff then paid Vang $200, or an average of $40 for each forty. The undisputed evidence was to the effect that that forty was worthless.

Upon these facts the trial court held that the covenant of seizin was broken as to that forty; and that by reason thereof the plaintiff was entitled to recover the $40 paid to buy in such tax title, with interest thereon from the time of such payment. Can this be sustained as a matter of law? Assuming that forty to have been unoccupied, yet the re-

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cording of the tax deed, as executed in 1872, with only one witness, would not give to the county as grantee, or any one claiming under it, the constructive possession. Assuming that the tax deed was perfected by the acquisition of a second witness, in 1879, yet four years prior to that time there was at least an attempt made on the part of the county to convey the land by quitclaim deed to H. Sheldon. While a tax deed regular upon its face and duly witnessed is presumptive evidence of the requisite authority on the part of the clerk to execute the same, yet no such presumption of authority to execute such quitclaim deed can be indulged. Sec. 653, R. S.; *Beemis v. Weege*, 67 Wis. 435. On the contrary, such authority must be proved. *Ibid.* Until such tax deed was duly witnessed and recorded, the land therein described was liable to be redeemed from such tax, and when so redeemed such deed would become a nullity. Sec. 1165, R. S.; *Internat. L. Ins. Co. v. Scales*, 27 Wis. 640; *Hewitt v. Week*, 59 Wis. 447; *Baldwin v. Ely*, 66 Wis. 181. This being so, and assuming that H. Sheldon paid a valuable consideration for such quitclaim deed, it probably operated as a payment of the tax, or, at least, placed the county in an awkward position to subsequently assert title in itself. It does not appear that the county or H. Sheldon subsequently ever asserted such title, or attempted to convey the same. It appears from the record that the deed to Vang was from A. J. Sheldon, not from H. Sheldon. True, none of such several deeds are in the record, but the substance and effect of each of them is said to be stated. From what has been said, it appears that Vang had no outstanding tax title or title of any kind to convey to the plaintiff, April 21, 1885, much less a deed sufficient to give him the constructive possession and operating as a constructive eviction of the *Whortons*, or the plaintiff as their grantee. But assuming that the taxes upon which such tax deed was given were not redeemed by the attempted purchase by H. Sheldon,

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still they would, at most, be a mere outstanding incumbrance upon the land for which the *Whortons* would not be liable to the plaintiff on any of their covenants until he had redeemed and discharged the same. *Pillsbury v. Mitchell*, 5 Wis. 17; *Mitchell v. Pillsbury*, 5 Wis. 407. We find nothing in the record showing any such redemption of such land from such taxes by the plaintiff's paying any one authorized to receive the same. But, even had he so redeemed, still he would have had no remedy in this action, which is based solely upon a breach of the covenant of seizin and right to convey, but would necessarily be remitted to his action for a breach of the covenant against incumbrances or some of the other covenants of the deed. It follows that the plaintiff improperly recovered for the $40, and interest thereon from April 21, 1885.

2. It is conceded that the *Whortons* never had any title to the Coon forty. It is claimed that it was included in the description of their deed to the plaintiff by some inadvertence or mistake. That forty was partly cleared up, with a house, out-buildings, and other improvements upon it. Its value at the time of such conveyance, without the improvements, was only $118, while its value with such improvements at that time was $648, making $530 for the improvements alone. The actual value at that time of the entire fourteen forties included in the deed was only $952. They were all sold and purchased as unoccupied and unimproved slashings, or lands from which the pine timber had been removed, and of variable values, and with the expectation or possibility of iron being found in the lands or some of them, at the rate of $100 for each forty, or $1,400 for the whole. The liability of the *Whortons* to the plaintiff for a breach of the covenant of seizin by reason of their not having title to the Coon forty is admitted. The only controversy in that regard is as to the proper measure of damages. It is conceded by all that, had the title failed to each

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and every of the entire fourteen forties, then the plaintiff would have been entitled to recover the entire consideration paid, with interest from the time of such payment, regardless of the question whether the actual value of all such lands were at the time less or greater than the consideration so paid. Such is undoubtedly the rule. The difficulty here seems to have grown out of the fact that the parties to the deed were not familiar with the actual condition of all the lands therein described, and thus included the Coon forty so improved,—a condition of things not then in contemplation of any of the parties,—and to which the *Whortons* had no title.

In apportioning and assessing the damages arising from such partial failure of title, it is claimed upon the part of the defense that the court or jury should be limited to the consideration paid, and the actual value of the whole and also the part to which the title failed, in view of such facts and circumstances *only as were actually in the contemplation* of both, or at least one, of the parties at the time of making the conveyance; while on the part of the plaintiff it is claimed that such apportionment and assessment of damages must depend entirely upon the consideration paid, and the *actual value*, at the time, of the whole and also of the part to which the title failed. Each party insists that his position is sustained by the decision of this court in *Messer v. Oestreich*, 52 Wis. 684. The trial court, while professing to follow the rulings in that case, rejected both claims, and held, in effect, that the plaintiff was entitled to recover as damages, by reason of such failure of title, the actual value of the Coon forty with all the improvements thereon at the time of making the conveyance, with interest thereon from that date.

This ruling of the learned trial judge in this case was substantially the same as the instruction of the trial court to the jury in *Messer v. Oestreich*, 52 Wis. 694, and which in-

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struction was there held to be error, and for which, in part, the judgment in that case was reversed. It is there said that "in *Morris v. Phelps*, 5 Johns. 49, the title to one sixth of the two tracts described in one deed failed, and the title to five sixths of the tract described in another deed failed; and KENT, C. J., giving the opinion of the court, makes this statement, and cites from the Year Books and Coke in support of it: 'The plaintiff was entitled to recover damages only in proportion to the extent of the defect of title. This is an old and well-settled rule of damages that, if one be bound to warrant, he warrants the entirety; but he shall not render in value but for that which was lost.' He concludes thus: 'There is, then, no law or reason why the plaintiff should recover more than one sixth of the consideration money and interest for the two tracts mentioned in the first count, and five sixths of the consideration money and interest for the tract contained in the second count.'" Pages 695, 696. Then, after citing several cases to the same effect, an attempt was made to state the conclusions of this court in that case, but in doing so, by some blunder of the writer hereof, or some inadvertence on the part of the copyist, the words "whole purchase price" were used instead of *the value of the whole piece purchased*, thus making nonsense of the context and what was designed by the court to be good sense. Having made the blunder, and the rule sanctioned being clearly in the mind of every member of the court, it was but a mere inadvertence to literally copy it in subsequent opinions. *Bartelt v. Braunsdorf*, 57 Wis. 3; *Docter v. Hellberg*, 65 Wis. 424.

What the court held in *Messer v. Oestreich*, 52 Wis. 696, and what the writer hereof there intended to say, was this: In the light of these authorities and others which might be cited, and in the absence of fraud, we conclude that where the title fails to only a part of the land conveyed, the grantee may recover in an action on the covenants of seizin

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and right to convey, or upon an agreement to convey, such a fractional part of the whole consideration paid as the value, at the time of the purchase, of the piece to which the title fails bears to the value of the whole piece purchased, and interest thereon during the time he has been deprived of the use of such fractional part, but not exceeding six years. It was there also held, in effect, that such comparative values should be taken as of the date of the purchase.

It follows as a corollary from these propositions, and was in fact held in some of the cases cited in that opinion, that parol evidence is admissible to prove such values. But the learned counsel for the defendants strenuously contends that such values are not to be determined from the actual and visible conditions of the several pieces of land at the time of the purchase, but from the conditions then supposed to exist, or contemplated by the parties, or at least one of them. In other words, that the Coon forty should be considered in such determination of values the same as though it had at the time of the purchase been pine slashings and not an improved farm. Such a rule would open the door to great uncertainty, if not perjury and fraud. The difficulty of proving what was in the contemplation of a party at a given time,—his mental conceptions,—except by himself, is evident; and the impossibility of disproving it at times is also apparent. The only case cited which seems to support such theory is *Leland v. Stone*, 10 Mass. 459. That was an action for a breach of the covenant of seizin contained in a deed of two pieces of land therein purporting to have been conveyed by the defendant to the plaintiff. The breach alleged was the absence of title at the time of the purchase to one of the pieces, consisting of one acre of land with the buildings thereon. The grantor pleaded specially, and in effect proved that when he so deeded he had no title to that acre; that eight years before he had conveyed it to his son by deed then of record; that the son had built a

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house upon it, and was living therein when the deed was delivered to the grantee,—all of which was then known to both parties; and that there was no intention of the grantor to sell, or the grantee to purchase, the acre then owned by the son. The court, after informing the jury that the defendant had failed to maintain the issue of *non est factum*, instructed them "that if they were clearly satisfied that neither the grantor nor grantee contemplated the passing of this one acre, and that no part of the consideration money was applicable to it; they might do justice, according to law, by finding the issue for the plaintiff and giving him no more than nominal damages. This was done by them, there being no evidence on the part of the plaintiff to contradict the defense." This verdict was sustained on the ground that the jury necessarily "found that the defendant paid nothing for that acre; that it was not considered by either party as included in the purchase, and was included in the deed by mistake. . . . As the defendant was not seized of the acre of land in question, it did not pass by the deed; *and the measure of* damages, therefore, would be the consideration paid for it, . . . In the present case the defendant has proved that in fact nothing was paid for this acre, and the jury have therefore very properly given only nominal damages." That case was followed, and the same rule sanctioned, in *Barns v. Learned*, 5 N. H. 264; *Nutting v. Herbert*, 35 N. H. 120.

In each of these three cases the whole consideration paid was agreed to be paid specifically for the lands to which the title actually passed by the deed; and the piece of land, the title to which did not pass by the deed, was inserted by mistake and without any consideration. The case of *Leland v. Stone*, *supra*, however, seems to have been limited, if not overruled, by subsequent cases in the same state. *Harlow v. Thomas*, 15 Pick. 66; *Spurr v. Andrew*, 6 Allen, 420. Thus, in seeking to distinguish the case in *Harlow v.*

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Thomas, it was said: "If two tracts of land are conveyed in one deed, but a separate price is agreed upon for each, then, on a breach of the covenant of seizin as to one tract, the rule of damages will be the sum which was paid for that tract."

Assuming such to be the correct rule, yet it seems to us that the evidence here fails to bring the case within the rule thus stated. True, the answer alleges, in effect, that each forty was sold "at the agreed price" of $100. But there is no evidence to show that any specific price was agreed upon for the Coon forty, or the other thirteen forties, or any one of them. The most that appears is that the fourteen forties were regarded in a general way as pine slashings of unequal value, and sold as a whole at $2.50 per acre, or $100 per forty, in the aggregate, but with no specific valuation fixed by agreement upon any one forty. The grantors manifestly supposed they were selling, and by the deed actually conveying, the fourteen forties described; and the grantee supposed he was thereby acquiring title to the same fourteen forties, for the price named. The deed purported to convey the Coon forty as well as the other thirteen forties. The grantors therein covenanted that they were then "well seized of the premises above described," including the Coon forty, "as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law, in fee-simple." Certainly the buildings and other improvements were as much a part of the realty as the soil. *Honzik v. Delaglise*, 65 Wis. 501. This being so, upon what theory are such improvements to be taken out from under the operation of such covenant in this action at law, where no equitable counterclaim, invoking equitable relief on the ground of mutual mistake, is interposed? There seems to be no more reason for excluding such improvements in apportioning such damages than there would have been to exclude valuable pine timber growing upon some of the

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other forties, had there been any. There is no more reason for confining such valuation to a section or subsection of the land divided horizontally than there would be to confine it to a fraction of the land when divided by a perpendicular line. The covenant relates to the one section or fraction as well as the other. The improvements consisted of open and visible conditions. It is unlike the case of a valuable mine subsequently discovered, suggested on the argument, of which we give no opinion. The doctrine of betterments is not involved.

The three cases cited do not go upon the theory of such part exclusion, but on the theory of a specific price agreed upon as to each piece, or of one piece being included by mistake and without any agreement to pay therefor and hence without consideration. Whether relief in equity might have been granted is not for us here to say, as the question is not presented. Some of the cases mentioned, however, indicate that it might. Thus, in commenting upon *Leland v. Stone, supra*, the court in *Spurr v. Andrew*, 6 Allen, 423, said: "So far as that case may be supposed to infringe upon the rule excluding oral evidence when offered to control or contradict the deed itself as the proper evidence of the contract between the parties, it is not to be extended. Under the equity powers conferred upon this court, full opportunity is afforded for parties aggrieved by the fact that their contracts as drawn and executed were the result of accident or mistake, and not such as to give effect to the real contract intended to be made, to apply to this court to have the same reformed and corrected. In that way proper relief may be granted." If a party may be relieved from his covenant in a case like this, it seems to us that his only remedy would be in equity.

3. The wives, having joined in the execution of the deed merely for the purpose of barring their dower right, were properly held not personally liable in this action on cove-

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nant. It follows that the plaintiff is entitled to recover against *William G.* and *John H. Whorton* such proportionate share of the whole consideration paid as the value of the Coon forty at the time of the purchase then bore to the value of the fourteen forties.

By the Court.—The judgment of the circuit court is reversed on both appeals, and the cause is remanded, with directions to enter judgment in favor of the plaintiff in accordance with this opinion.

TAYLOR, J. *W. G. Whorton* and the other defendants sold and conveyed to *Parlon Semple*, the plaintiff, fourteen forty-acre tracts of land, by warranty deed, for the gross consideration of $1,400, or at the rate of $100 per forty acres. The grantors had no title to one forty-acre tract at the time the deed was given, and this action is brought mainly to recover damage for the breach of warranty as to the title of such forty-acre tract. The evidence both of the plaintiff, *Semple*, and of the defendants, the *Whortons*, shows conclusively that at the time of the sale it was understood by both parties that the lands sold were none of them improved or farm lands. They were all supposed to be pine slashings, or lands from which the pine timber had been removed, but entirely unimproved in any way. There is evidence on the part of the plaintiff tending to show that one inducement in buying the same was that he thought there might be iron ore on some part of the tract. But the evidence wholly negatives the idea that the plaintiff bought the land with the expectation that any part of it was improved in any way. It turned out that the defendants had never owned the lands to which the title failed, and that it was a mere mistake on their part in supposing that it was their land and undertaking to convey it by their deed. It also appeared on the trial that this forty acres was an improved farm with a dwelling-house, outhouses, and fences

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thereon; that the value of the forty acres without any improvements, and in the state that both parties supposed it to be at the time of the conveyance, was about $120; that the improvements were of the value of $528, or the whole value of the forty acres $648. The court found as a fact that the value of the forty acres at the date of the deed was $648 in all, including all the improvements, and that at the time of the execution and delivering of said deed the actual value of the entire fourteen forties was only the sum of $952; in other words, that the other thirteen forties were only worth the sum of $304. The court ordered judgment in favor of the plaintiff, for the breach of the covenant as to this improved forty acres, for the said sum of $648, and interest from the date of the deed to the date of the judgment. There was also included in the judgment about $40 additional for an alleged breach of the warranty as to another forty-acre tract; but, for the purposes of this opinion, that finding of the court is entirely immaterial, and I do not differ with the majority of this court in their opinion in regard to that $40.

From the judgment rendered the plaintiff appeals, and alleges as error that the court ought to have rendered judgment in his favor, for the breach of covenant as to this forty-acre tract, for the sum of $952, and interest from the date of the deed to the date of the judgment. The defendants also appealed from the judgment, and they allege as error that the plaintiff should have been limited in his recovery to $100 and interest, or at most to the comparative value of this forty acres, without including in such value anything for the improvements. Such comparative value was found to be $118 or $120.

In the opinion of the majority of this court, the plaintiff is entitled to recover, for a breach of the covenant to the forty acres in question, the same proportion of the $1,400 purchase money that the value of the forty acres, with the

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improvements, bears to the actual value of the whole tract, which, according to the finding of the trial court, is $648; and the value of the whole tract was in fact only $952, so that the plaintiff is to recover as his damages on the breach 648-952 of $1,400, the purchase price, with interest thereon, which amounts to the sum of $952.72, a few cents more than the actual value of all the lands purchased by him.

The result is based upon a general rule laid down in a great many cases both in this and other courts that in an action for a breach of the covenant of seizin in a deed of real estate, where the title fails to a part of the land conveyed, and the land is conveyed as a whole for a gross sum agreed upon, the measure of damages is the same proportion of the purchase money that the value of the land to which the title fails bears to the actual value of all the lands conveyed, the values being ascertained at the date of the sale. The well-established rule in the same courts is that the measure of damages in all cases of a breach of the covenant of seizin when the whole title fails, is the purchase price and interest. It follows that this rule must be applied to the case of a breach of the covenant when the title to a part only fails. When the title to a part fails, the court must, if it can, ascertain what the grantee paid for that part; and when a gross sum is paid for the whole the rule above stated is, under ordinary circumstances, the most equitable, and perhaps the most certain, rule for ascertaining that fact. This rule was established as a general rule in ordinary cases for the purpose rather of getting at the price paid for the part lost and so fixing the amount of damages, than as an arbitrary rule for assessing damages. This is evident from the fact that when the title fails to an undivided part of the whole land conveyed the damages are always limited to the same part of the whole purchase money, without any inquiry as to the value of the land conveyed. It must be evident that the value above stated, in the case of the failure

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of title to a separate part of the lands conveyed, cannot be an arbitrary rule to be applied to all cases irrespective of the facts which tend to show that no such price was in fact paid for the tract to which the title failed. It is at most *prima facie* evidence of the fact.

No court would, I think, insist that the rule should be applied when the evidence clearly shows what price was actually paid for the portion to which the title failed, whatever the form of the deed might be. In the case at bar, had the evidence shown that the plaintiff had contracted to pay the defendants $1,300 for the other thirteen forty-acre tracts, and, before the execution of the conveyance, the plaintiff had agreed to purchase the forty acres in question and pay $100 for it, and the fourteen tracts were afterwards put in the same deed for the gross sum of $1,400, no court could, I think, with any degree of justice, say that in case of a failure of the title to the forty acres last purchased, the grantee ought to recover more than the $100 and interest, irrespective of its real or comparative value. In all such cases the courts limit the recovery to the money actually paid and interest, no matter what the form of the deed. See *Rich v. Johnson*, 2 Pin. 88; *Mecklem v. Blake*, 22 Wis. 495; *Smith v. Hughes*, 50 Wis. 620; *Reynolds v. Vilas*, 8 Wis. 471; *Hannan v. Oxley*, 23 Wis. 519, 522, 523; *Staats v. Ten Eyck*, 3 Caines, 111; *Leland v. Stone*, 10 Mass. 463.

The general rule adopted by this court to find the price paid by the grantee for the part to which the title fails and so fix his damages, is based wholly upon the presumption that the parties purchased the entire tract with the knowledge of, and in contemplation of, the fact that one part of the land purchased was of more value than another part. A party buys an improved farm, with buildings, orchard, garden, cultivated fields, woodlands, and perhaps barren hills. In such case, if the title fails to a part of the farm conveyed, the general rule of the cases would more

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certainly determine the amount of the purchase price of the part to which the title had failed than any other. So, if a party buys a large tract of unimproved land, both the buyer and seller take into account that some parts of the tract in its natural state are likely to be of more value than other parts. That matter is in the contemplation of both parties to the agreement, and in such case the general rule fixes the price paid for the part to which the title fails more certainly and more equitably than any other general rule. But in a case like the one at bar, when it turns out that the tract to which the title fails is of more value than any of the other parts of the tract purchased, not on account of anything in the contemplation of the seller or purchaser but by reason of facts of which neither had knowledge at the time and which the purchaser did not take into consideration when purchasing or in fixing the price he was willing to pay, the general rule wholly fails to determine the question as to what the plaintiff paid for that tract. By what rule of logic can you prove that the purchaser paid for the tract the value which it turns out to have by reason of the improvements thereon, when he says he did not buy it with the view to its value on account of any improvements thereon, but with the express understanding that it was unimproved? It seems to me, in such case, the general rule fails; and the actual comparative value of the tract depending upon matters not known to the parties at the time, and which both say were not taken into consideration at the time of the sale, cannot now be taken into consideration in an endeavor to fix the price paid for such tract. If the majority of this court has made a mistake in this case, it is in holding that the general rule of this and other courts is an arbitrary and universal rule as to the measure of damages, and not a rule simply established for the purpose of determining a fact upon which the judgment for damages must be based, viz., What did the grantee pay for

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the tract to which the title fails? All, I think, must agree that the rule that the grantee is limited to the purchase price paid, must apply as well to the case of the failure of the title to a part of the tract as when the title to the whole fails. And the general rule of the cases is adopted as the most equitable in ascertaining that fact in ordinary cases, and so is stated as the rule for assessing the grantee's damages; but, properly speaking, it is a rule for ascertaining the price paid by the grantee for the tract to which the title has failed, and so necessarily fixes the amount of his damages.

That the rule cannot be the true rule in all cases for determining what the grantee paid for the tract to which the title failed, let us suppose a few cases which might well arise in this country. A. supposes he owns two vacant lots in a city, of equal or nearly equal value. In the belief that he owns both, he conveys them by warranty deed to a purchaser for a gross sum of $2,000, who buys them as vacant and unimproved lots, neither party knowing or believing that either has any improvements thereon. It turns out that the title to one of the lots fails, and that on such lot there is a fine building worth $8,000, eight times the value of the lot. Now, in an action in which it becomes necessary to determine what the grantee paid for that lot, is it possible that the $8,000 house should be considered at all? To my mind it is clear that it could have no kind of probative power in determining that question, and cannot, therefore, furnish any basis upon which to compute his damages. Suppose, again, that in a case of a sale of the two lots the title fails as to an undivided nine-tenths of both lots. In that case it is clear that the grantee can recover only $1,800, or nine tenths of the purchase price, and interest, and will only have one tenth of the lots purchased left, or one fifth of one lot; and in the other case, under the general rule applied as in the case at bar, he will recover $1,800 and interest, and have one half

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of the property purchased left, or one whole lot. Suppose, again, A. sells to B. an improved farm. It is bought and sold as a farm for farming purposes, and not with any view on the part of the purchaser that it contained a mine of any kind, and it turned out that a barren hill on one end of the farm contained a very valuable mine of iron, coal, or other mineral, and the title to the hill fails. Can it be fairly argued that, in an action to determine what the plaintiff actually paid for the hill, the fact that there was a mine in it when he bought it can in any way tend to prove such fact? I think not. The mine might make the hill, the value of which as a part of the farm, for farming purposes, was merely nominal, ten or a hundred times more valuable than all the rest of the farm together. Would it not be an absurdity to say that the purchaser, when he bought the farm, paid as the purchase price for that part of it ten or one hundred times as much as he did for all the rest of the farm? The mere statement of the case is sufficient to show the fallacy of such claim. If, however, the purchaser had reason to think or believe there was a mine in the hill when he bought the farm, and bought it in contemplation of that supposed fact, and there was in fact a mine in such hill, and the title failed as to it, the general rule might well be applied, especially if the seller knew of the object of the purchaser in making the purchase, because it might fairly be said that he paid his money, or the greater part of it, on the strength of his belief in the existence of the mine. So, in the case at bar, the plaintiff says he bought the tract with the belief that there might be an iron mine on it. Had there been such a mine on the forty acres to which the title failed, he might well insist that the general rule should apply, and that, in determining what he paid for this forty acres as compared with the other tracts, the value of the mine should be considered.

Irrespective of any ulterior consequences, were the issue

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submitted to a court or jury to find what sum the plaintiff paid for the forty acres of land upon the evidence in this case, is it possible that the court or jury would find that he paid $952.75? I think it very nearly absurd to suppose such could be the verdict, and yet it seems to me such is the effect of the decision made in this case, or else the court must be of the opinion that the damages of the plaintiff are not limited by the price he in fact paid for the land.

I cannot see that there is any force in the objection that this evidence, which has a strong tendency to prove the fact of the price paid, is in violation of the rule that parol evidence is not admissible to contradict the deed. This rule would undoubtedly apply if the defendants were seeking to recover of the plaintiff the value of the improvements on this forty acres, supposing the title had passed to the plaintiff under the deed. In such case the deed would be conclusive upon the grantor that he intended to convey whatever was a part of the real estate described in the deed; and, if there had been any mistake or fraud, he could get relief only in equity. But in the case at bar the evidence is not offered for any such purpose. It is offered to prove what was the real consideration paid by the plaintiff for this particular tract, and it is just as admissible as though offered to show what he had paid for the entire tract. Such evidence has always been held admissible by this court in actions of this kind. To me it does not seem consistent that when a plaintiff brings his action to recover for a breach of the covenant of seizin, when the breach extends to all the land conveyed in the deed either party may show by parol what the real consideration was, irrespective of the deed; but, when he brings his action to recover for a breach as to a fraction of the tract, no proof can be given to show what he paid for that fraction of the tract, and that nothing will show the fact except an arbitrary rule that he must in all such cases be conclusively deemed

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to have paid such part of the entire purchase money as the actual value of such part of the tract bears to the actual value of the whole tract. It is the settled law of this state, as of most of the states in the Union, that the damages under the covenant of seizin are limited by the consideration money paid, the interest, and sometimes the costs of the suit by which the plaintiff was evicted. See *Caulkins v. Harris*, 9 Johns. 325; *Staats v. Ten Eyck's Ex'rs*, 3 Caines, 111; *Pitcher v. Livingston*, 4 Johns. 1; *Bender v. Fromberger*, 4 Dall. 441, 442; *Marston v. Hobbs*, 2 Mass. 433; *Gore v. Brazier*, 3 Mass. 543; *Lowther v. Comm.* 1 Hen. & M. 202; *Nelson v. Matthews*, 2 Hen. & M. 164; and the cases cited from this court above.

The same rule is adopted when the title to a part fails. This was expressly held in *Staats v. Ten Eyck's Ex'rs, supra.* In that case, Ten Eyck had conveyed two lots for the gross sum of £700, stated in the deed. The title failed to the undivided half of one of the lots, and on the trial it was shown that Staats received £300 as the consideration for the lot as to which the title to one half failed, and the plaintiff was limited to a recovery of £150 and interest. In that case, KENT, C. J., states the rule as laid down by Sir William Jones as follows: "On a sale declared void by the court for want of ownership, the seller is to pay the price to the buyer; and what price? Is it the price actually received, or the present value of the thing? The answer is, the price for which it was sold,— the price agreed on at the time for which it was sold, the price agreed on at the time of the sale and received by the seller,— and this price shall be recovered although the value may have been diminished." There is no question that the rule above stated should be applied when the title to a part of the conveyed premises fails; and the only difficulty is in determining what was in fact paid for such part. And when it is evident that the general rule — that the comparative value of that part —

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does not show this fact, we must resort to other evidence to establish it. That the general rule utterly fails when such comparative value depends upon matters which were not contemplated or taken into consideration at the time of the sale by either party to the contract in fixing the amount to be paid, is to me very evident. As was said by the learned counsel for the defendants on the hearing, the authorities bearing upon this exact point are not numerous, but those that are found are very clear. Among the very earliest cases in England it was held that when the title failed the rule was to return the value of the land at the time of the sale; and it was held that the fact that after the sale was made a mine had been discovered on the land, could not be taken into consideration in determining that value. It is evident that this rule was established for the reason that the undiscovered mine was not taken into consideration by the parties at the time of the sale in fixing such value. 22 Vin. Abr. tit. "VOUCHER," T, *b*, p. 145; *Gore v. Brazier*, 3 Mass. 543; *Leland v. Stone*, 10 Mass. 459, 463.

I see no necessity for compelling a defendant to seek relief in a court of equity when the title has failed to a part of the premises conveyed, in a case of this kind. Take the case of the supposed sale of the two city lots for the $2,000, sold as vacant lots. The title falls to one, which unexpectedly has an $8,000 house on it. Is there any difficulty in ascertaining what the grantor paid for that lot when he purchased it? To my mind there is no difficulty. It is a mere inquiry as to a fact easily ascertained by the circumstances attending the purchase. And neither the statute law nor any law based upon the decisions of this court or any other court has made it unlawful to ascertain that fact in an action at law. If it is to be held that the price paid by the grantee for the part to which the title fails is not to limit his damages in such case, but that he must in all such cases recover as his damages the comparative value of such

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part, irrespective of what he paid for the same, then, perhaps, it might be necessary for the defendant, in an action brought to recover damages for the failure of title to a part of the premises conveyed for a gross sum, to set out the fact in his answer which would show that equitably such rule ought not to apply in that particlar case.

It is also objected that if, in order to fix the price which the grantee paid for the part to which the title has failed, evidence can be given for the purpose of showing what was in the contemplation of the parties when the sale and purchase were made, great uncertainty will arise as to what the measure of damages shall be in such cases. This objection ought not to prevail if it be admitted that the price paid is to limit the damages. There is no more difficulty in fixing the price paid in such cases than in hundreds of other cases where the establishment of a material fact depends upon parol testimony and the recollection of witnesses as to the facts pertinent to the issue.

In my opinion, the plaintiff ought to be limited in his recovery to the sum of $120, and the interest, that being the comparative value of the land exclusive of the improvements thereon.

GALLOWAY, Respondent, vs. HAMILTON, imp., Appellant.

March 25 — April 12, 1887.

Corporations: Deed, how executed: Ratification: Creditors' action.

1. A deed of land by a corporation, to be valid, must, under sec. 2216, R. S., be signed by its president or other authorized officer, sealed with its seal, and countersigned by its secretary or clerk.
2. A subsequent ratification of a deed of corporate land executed only by the president, cannot affect the lien of an intervening judgment creditor of the corporation.

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3. A deed of corporate land, executed without authority by the president of the corporation, on the eve of its insolvency, not followed by a change of possession before the levy of an execution by a creditor, will not confer an equitable title as against such creditor, though there had been previous negotiations about the purchase and the purchase money was paid.
4. Where a judgment has become a specific lien upon land actually belonging to the judgment debtor, by the levy of an execution thereon, equity will entertain an action by the judgment creditor in aid of his execution, without a previous return thereof, to remove an obstruction, such as a fraudulent conveyance of the land, which will prevent a sale at full value.

APPEAL from the Circuit Court for *Lincoln* County.

The case is stated in the opinion. The defendant *Hamilton* appeals from a judgment declaring the conveyance by the defendant corporation to her to be void.

Edward P. Vilas, for the appellant, contended, *inter alia*, that except when brought by a receiver, an action of this kind can be maintained only after the legal remedies have been exhausted. *Smith v. Weeks*, 60 Wis. 94. The former proceedings by bill in equity have been superseded by proceedings supplementary to execution (secs. 3030, 3031, R. S.). *In re Remington*, 7 Wis. 643; *Graham v. La C. & Mil. R. Co.* 10 id. 459; *Almy v. Platt*, 16 id. 169; *Clark v. Bergenthal*, 52 id. 103. And the right to maintain this action depends wholly upon sec. 3029, R. S., which gives the right only *after the return of execution*. *Hyde v. Chapman*, 33 Wis. 391. In each of the following cases the execution had been returned: *Gates v. Boomer*, 17 Wis. 455; *Winslow v. Dousman*, 18 id. 456; *Williams v. Sexton*, 19 id. 42; *Clark v. Bergenthal*, 52 id. 103. The judgment was not a lien upon the land. *Hyde v Chapman*, 33 Wis. 391; *Manhattan Co. v. Evertson*, 6 Paige, 465; *McKee v. Gilchrist*, 3 Watts, 231; *Jacoby's Appeal*, 67 Pa. St. 435; *Mulford v. Peterson*, 35 N. J. Law, 133. The conveyance to the appellant was sufficient in equity, though lacking the signature of the secre-

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tary; she having acted in good faith, paid the purchase money and been let into possession. *Dreutzer v. Lawrence*, 58 Wis. 594; *West v. Agricultural Board*, 82 Ill. 205. The previous contract might have been specifically enforced. *District No. 3 v. Macloon*, 4 Wis. 79; *Blanchard v. McDougal*, 6 id. 167; *Knoll v. Harvey*, 19 id. 99; *Horn v. Ludington*, 32 id. 73.

For the respondent there was a brief by *Edward S. Bragg*, and oral argument by *C. N. Gregory*.

Cole, C. J. It appears from the complaint and proofs in this case that the plaintiff recovered a judgment against the defendant corporation in the circuit court of Lincoln county on the 3d day of October, 1883, and on that day the judgment was docketed. An execution was issued on this judgment, and the sheriff, not finding sufficient personal property to satisfy the execution, on the 4th of October, 1883, levied upon certain real estate as the property of the judgment debtor. An examination of the records in the register's office disclosed a deed of this real estate from the company to the defendant, *Mrs. Hamilton*, for the consideration of $3,500, which deed was dated October 1, 1883, acknowledged the next day; signed and acknowledged by C. K. Pier, as the president of the company, with the corporate seal affixed, but not signed by any other person or officer. It is claimed that this deed was not executed or delivered by the authority of the company, but was the individual act of its president, and that the title to the real estate, in law and in equity, was vested in the company when the levy was made. This action is in aid of the execution, and to remove a cloud upon the title, and to have this deed declared void as a fraudulent obstruction in the way of enforcing the sale upon the execution. It appears that this action was commenced before the return of the execution and while it was still in the hands of the sheriff,

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and before the time for its return had expired. And the learned counsel for the defendant, *Mrs. Hamilton*, contends that a court of equity will not take jurisdiction of an action of this nature until the execution has been returned unsatisfied in whole or in part, and made an elaborate argument in support of that position. We think, however, he misconceives the nature of the action; for if it be true that the real estate seized on the execution belonged to the judgment debtor, and a deed has been put upon record which purports to convey the legal title to another, which will have the effect to defeat or greatly impair the lien unless the deed is canceled, we suppose it is well settled that a court of equity will interfere and remove the inequitable obstruction. "The equitable relief sought rests upon the fact that the execution has issued, and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation. It is to remove the obstruction, and thus enable the creditor to obtain a full price for the property, that the suit is brought." *Jones v. Green*, 1 Wall. 330; *Gates v. Boomer*, 17 Wis. 455; *Cornell v. Radway*, 22 Wis. 260; *Beck v. Burdett*, 1 Paige, 305; *North American Fire Ins. Co. v. Graham*, 5 Sandf. 197; *McElwain v. Willis*, 9 Wend. 548; *Brainard v. Van Kuran*, 22 Iowa, 261; *Fleming v. Grafton*, 54 Miss. 79; *Montgomery v. McGee*, 7 Humph. 234; *McNairy v. Eastland*, 10 Yerg. 310.

Here the enforcement of the legal remedy is obstructed by an alleged fraudulent conveyance which prevents or embarrasses the sale upon execution. Where "the judgment of the plaintiff is by statute a specific lien upon the land without the issue or levy of an execution, it would seem that the plaintiff is entitled to the aid of the court, whether execution has been issued and returned unsatisfied or not; and especially would this seem to be so where it appears from the complaint that the plaintiff is otherwise without

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means of obtaining satisfaction of his debt. The existence of the lien without adequate remedy for enforcing it at law, by reason of the fraudulent or inequitable obstruction interposed by the defendant, is sufficient to give a court of equity jurisdiction." DIXON, C. J., in *Cornell v. Radway*, *supra*. See, also, *Angell v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200; 3 Pom. Eq. Jur. sec. 1415, and notes.

In the case of a creditor's bill proper, where a party seeks a discovery of assets or to reach equitable interests or choses in action which are not subject to levy and sale at law, there it is necessary that all legal remedies shall be exhausted by the issuing of an execution which has been returned unsatisfied in whole or in part, before equity will interfere. But this action does not belong to that class, but, in its scope and principle, is like that of *Cornell v. Radway*, *supra*.

The next inquiry, then, is, Has the plaintiff acquired a lien upon the real estate in question, or, in other words, is there ground for saying that it was the property of the judgment debtor when the levy was made? The deed was executed by C. K. Pier, the president of the corporation, which had an acting secretary. It does not appear that the corporation authorized the making of the deed, though Mr. Pier says he was accustomed to sign and execute deeds of real estate for the company, as he did the one to *Mrs. Hamilton*. Our statute prescribes how lands owned by a corporation organized under any law of this state shall be conveyed. The deed, to be valid, must be signed by the president, or other authorized officer of the corporation, sealed with the corporate seal, and *countersigned by the secretary or clerk*. Sec. 2216, R. S. This provision is controlling, and shows that there was no proper execution of the deed dated October 1, 1883, even if it had appeared that the president was authorized by the corporation to make it; for we suppose, where a general law provides as to the mode in which a deed of a corporation conveying its real

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estate shall be executed, this mode must be adopted in order to its validity as a corporate act. Ang. & A. Corp. § 221.

In this case the deed was never countersigned by the secretary, and, as we understand his testimony, he subsequently refused to sign the instrument when presented to him some few weeks after its date. It is claimed that the act of the president in executing the deed was subsequently ratified. But, if it was, the ratification could not affect the plaintiff's lien, which had previously attached. For "the general rule as to the effect of ratification by one of the unauthorized acts of another respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." *Cook v. Tullis*, 18 Wall. 332, 338; *Taylor v. Robinson*, 14 Cal. 401; Story on Agency, §§ 241–244.

It is further said by the defendant's counsel that this conveyance, though not properly executed, was sufficient in equity, the purchase money having been paid and the purchaser having been let into possession. We think it a fair inference from the testimony that the purchase money was paid to C. K. Pier in the forenoon of the 3d of October, 1883, and that there had been some previous talk between him and *Mrs. Hamilton* about her buying some of the real estate of the corporation. But there was nothing very definite or certain in the terms of this parol agreement, even if one was made and Pier had authority to make

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the sale. There is no evidence that there was a change of possession before the levy was made, and, as we have said, it does not appear that Pier was authorized to sell the real estate. Such being the case, we think the evidence shows that the property belonged to the corporation when the levy was made.

The court below found that the judgment debtor was on the 1st of October, 1883, seized and possessed of the real estate, and continued so possessed until after the levy, and that the company was insolvent. Further, that the acting secretary never authenticated or countersigned the deed, and that the same was void as against the judgment and execution of the plaintiff, and ordered the deed to be canceled of record. We think this view of the case was correct, and that the judgment of the circuit court must be affirmed.

By the Court.—Judgment affirmed.

CHAPMAN, Respondent, vs. SUTTON, Appellant.

March 25 — April 12, 1887.

Action for money paid on judgment: Receipt: Evidence: Appeal: Waiver.

1. If, pending an appeal from a judgment, the appellant pays the amount thereof in settlement of a creditors' suit commenced to enforce the same, the payment is not voluntary, but if such judgment is afterward reversed, or the amount thereof reduced by the appellate court, he may, in an action for that purpose, recover back the amount paid, or the excess above the judgment in the latter court.
2. Parol evidence is admissible to show whether a receipted bill for the amounts of judgments and costs in certain actions specified, given on settlement of a creditors' suit pending thereon, was understood

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and intended by the parties at the time to evidence a settlement of an appeal in one of those actions.

3. Payment of a judgment is not a waiver of an appeal then pending, or of the right to appeal therefrom, or to bring a writ of error to review it.

APPEAL from the Circuit Court for *Columbia* County.

For a history of the litigation between these parties prior to the commencement of this action, see *Sutton v. Chapman*, 64 Wis. 312. This action was brought in pursuance of the decision there made, to recover the amount paid on the judgment against *Chapman* in justice's court.

The facts are stated in the opinion. The defendant appeals from a judgment in favor of the plaintiff. The tender of payment made by Hasey in the creditors' suit, and the statements and receipt mentioned in the opinion are as follows:

"[Title of cause.]

"The defendant John Hasey hereby tenders to you, the plaintiffs in the above-entitled action, the sum of $367.64, the same being the full amount claimed by you to be due to the plaintiffs for damages, with interest thereon up to day; also the sum of $25 as costs. And defendant Hasey hereby tenders and offers to pay the balance of the plaintiffs' costs, if more is claimed, as soon as the amount of the same can be determined. And, for the purpose of having the amount thereof settled and determined, the defendant John Hasey demands a bill of the plaintiffs' costs, and the defendant Hasey hereby offers to appear before the clerk of this court, at his office in the city of Jefferson, in Jefferson county, at any time, on due and sufficient notice to enable the defendant Hasey to get to the office of said clerk, for the purpose of having the plaintiffs' costs taxed and determined.

"Yours, etc., E. V. Briesen,

"Attorney for Defendant Hasey.

To J. C. McKenney, Attorney for Plaintiffs, Mil., Wis.

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STATEMENT OF PLAINTIFFS' CLAIM.

First, J. J. Sutton.

Judgment against A. Chapman		$177 01
With interest since May 18, 1883		10 87
Sub-costs	$8 25	
Interest on same since August 21st	35	8 60
		$196 98

Second, M. J. Roberts.

Judgment *vs.* A. Chapman		$154 84
With interest since May 17, 1883, up to date		9 50
Sub-costs	$7 00	
Interest	31	7 31
		$171 16
Total claim		$367 64
Costs		25 00
Total tendered		$392 64

"E. V. BRIESEN,
"Attorney for Defendant Hasey.

"$392.64. MILWAUKEE, WIS., April 4, 1884.

"Received of John Hasey, Esq., the sum of $392.64, as above stated.
"J. C. MCKENNEY,
"Attorney for Plaintiffs."

For the appellant there was a brief by *Lander & Lander*, and oral argument by *John J. Sutton*, in person. Among other things, they argued that the tender and payment in this case were intended and understood to be in settlement of the whole litigation between the parties; and the payment being voluntary, with full knowledge of the facts, and not induced by any fraud, the money could not be recovered back, citing *Harrison v. Milwaukee*, 49 Wis. 247; *Custin v. Viroqua*, 67 id. 314. The tender was an admission of the justice of the claim. *Schnur v. Hickcox*, 45 Wis. 200. And if the respondent intended to contest the right of the appellant, he was bound to take his position at the time of the demand. *Flower v. Lance*, 59 N. Y. 603; *Peyser v. Mayor*, 70 id. 497.

P. G. Stroud, for the respondent.

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COLE, C. J. The contention of the appellant is that the evidence clearly shows that when Hasey, one of the defendants in the creditors' suit pending in Jefferson county, made the tender and payment of the two judgments and costs in that suit, this was understood and intended to include the action of *Sutton v. Chapman*, pending on appeal in Columbia county. There is certainly testimony to sustain this contention; but indisputably there is a serious conflict on that point. It is not worth while to discuss the evidence in detail. The circuit court found that the payment of the judgments involved in the creditors' suit was not understood or intended by the parties to be a settlement of the appeal action of *Sutton v. Chapman*, or of all pending litigation. It cannot well be claimed that this finding is so unsupported by evidence that this court would be justified in setting it aside.

But the appellant insists that the writings made at the time between Hasey and McKenney furnish the best possible evidence of what took place and what the settlement was intended to include. The writings consist of a statement of the amount of the judgment of *Sutton v. Chapman*, with costs and interest to April 4, 1884; also the judgment of *Roberts v. Chapman*, costs and interest to the same date, and a receipt by McKenney, as attorney of *Sutton*, of the payment of the entire amount mentioned in the statement. At this time the costs in the equity suit had not been taxed, and only a part were then paid. Subsequently the costs were taxed and the remainder was paid to McKenney, who gave a receipt for the same. These writings are a statement of the amount of the two judgments and an acknowledgment of payment. They are properly receipts, affording most satisfactory evidence of a settlement of the equity suit, but not conclusive of the fact that such settlement was intended to include the case of *Sutton v. Chapman*, pending on appeal. The appellant might well have supposed that

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the settlement of the equity suit would stop all further litigation in pending actions between him and *Chapman;* but it is difficult to hold that the writings furnish clear and satisfactory evidence of that fact. The writings, being in the nature of receipts, are open to evidence as to whether the payment of the judgments in the equity suit was understood and intended at the time to be a settlement of the action pending on appeal in Columbia county. This manifestly was the view taken of the effect of these writings on the former appeal, when they were all before the court (64 Wis. 312), for the case was then sent back to have that question tried and determined. This would not have been done if in the view of the court the writings themselves afforded conclusive evidence that the settlement included the appeal suit.

It will be remembered that the equity suit was between different parties, and its settlement would not necessarily settle and dispose of that action. The law is well settled that payment of a judgment is no waiver of the right to appeal therefrom, or to bring a writ of error to review it. *Clark v. Pinney*, 6 Cow. 297; *Sturges v. Allis*, 10 Wend. 355; *Peyser v. Mayor*, 70 N. Y. 497; *Mann v. Ætna Ins. Co.* 38 Wis. 114; *Sloan v. Anderson*, 57 Wis. 124. "Coercion by law is where a court, having jurisdiction of the person and the subject matter, has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he cannot resist the execution of it, when execution is attempted he may as well pay the amount at one time as at another, and save the expense of delay." *Peyser v. Mayor, supra.* Money paid under such circumstances may be recovered back on the reversal of the judgment, on the principle that it belongs *ex æquo et bono* to the party paying it. The appellant was endeavoring to collect his original judgment

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by his creditors' bill, and continued to press that suit until it was settled. If, instead of taking this course, he had collected the judgment by execution pending the appeal therefrom, there would be no doubt of the right of the plaintiff herein to have the excess refunded to him.

The court finds that Hasey settled the equity suit and paid the amount of the judgment at the instance and request of the plaintiff. The appellant objects to the amount of the recovery in this action. We do not see any error in the judgment on that ground. On application the court will doubtless offset or deduct the judgment previously recovered by the appellant from this judgment. This will do justice to the parties.

It results from these views that the judgment of the circuit court must be affirmed.

By the Court.— Judgment affirmed.

ORTON, J., dissents.

LEARY, Respondent, vs. LEARY and wife, Appellants.

March 25 — April 12, 1887.

(1, 2) Real party in interest: Title to note: Burden of proof. (3, 5) Evidence: Immaterial errors. (4) Newly discovered evidence: Opening case: Terms. (6) Payment: Evidence. (7, 10) Foreclosure of mortgage: Form of judgment: Lis pendens: *Appeal: Bill of exceptions. (8, 9) New trial: Appeal: Evidence. (11) Parent and child: Board, etc., furnished. (12) Constable: Service of subpœna: Return: Presumption. (13) Costs: Witnesses: Affidavit: Reversal of judgment.*

1. A formal assignment of a note and mortgage, executed by the mortgagee in writing under seal, is ample proof of the assignee's legal title thereto, without proof of any consideration paid.

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2. After the plaintiff in an action of foreclosure has shown a legal title in himself to the mortgage in suit, the burden of showing that he is not the real party in interest is upon the defendant.
3. The exclusion of proper evidence which, though admitted, would not, in the absence of other evidence, have established the fact sought to be proved, is not sufficient ground for reversing the judgment.
4. The court before which an action has been tried without a jury may properly, even after the case has been submitted and its decision has been announced, open the case for further evidence, if it appears that new and material evidence has been discovered by the defeated party since the submission; and this it may do without imposing terms.
5. The admission of improper evidence against objection, in a case tried by the court, is not sufficient ground for reversing the judgment if, upon the whole record, independent thereof, the findings of the court are sustained.
6. The evidence in this case (stated in the opinion) is held to sustain the findings of the trial court that the note and mortgage in suit had not been paid.
7. A judgment of foreclosure will not be reversed for irregularity merely because it provides that the plaintiff may have execution for any deficiency after a sale of the mortgaged premises. Such a provision, not stating against whom the execution is to issue, may be construed to mean that the plaintiff may have a judgment for deficiency against the persons liable therefor.
8. A motion for a new trial, made after the term at which judgment was entered, cannot be reviewed on appeal from such judgment.
9. *It seems* that it would not be an abuse of discretion to refuse to grant a new trial upon the strength of any statement made by a witness who is in his dotage, though contradictory of his testimony at the trial.
10. The fact that the bill of exceptions does not contain the proof of the filing of the notice of *lis pendens* in an action to foreclose a mortgage, is not ground for reversing the judgment, especially where the fact of such filing is found by the court and the judgment recites the fact and that there was due proof thereof.
11. In the absence of any agreement by a father to pay for board, lodging, and washing while living with his son as a member of his family, the latter cannot recover payment therefor.
12. The return of a constable upon a subpœna issued out of the circuit court is presumptive evidence that it was served as therein stated, and that the charges therein are proper.

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18. The affidavit of the attendance of witnesses stated that they had traveled a certain number of miles. The court, in taxing the costs on appeal from the clerk, allowed for twice that number of miles. On appeal, there being no pretense that witnesses did not in fact travel the number of miles allowed for, this court declines to reverse the judgment.

APPEAL from the Circuit Court for *Brown* County.

The case is sufficiently stated in the opinion.

W. J. Lander, for the appellants, contended that the plaintiff had failed to show that he was the real party in interest, as he was bound to do. *Getzlaff v. Seliger*, 43 Wis. 302. There being no express trust, he could not sue as trustee. *Kimball v. Spicer*, 12 Wis. 668; *Robbins v. Deverill*, 20 id. 142; *Carpenter v. Tatro*, 36 id. 297; *Tate v. O. & M. R. Co.* 10 Ind. 174; *Conyngham v. Smith*, 16 Iowa, 471. A new trial ought not to have been granted, the newly discovered evidence being merely cumulative, and the plaintiff not having shown diligence. *Edmister v. Garrison*, 18 Wis. 603; *Russell v. Loomis*, 43 id. 545; *Jalie v. Cardinal*, 35 id. 118; *Herman v. Mason*, 37 id. 273; *Wilson v. Plank*, 41 id. 94. Or, if granted at all, it should have been upon terms. *Carroll v. More*, 30 Wis. 574; *State ex rel. Voight v. Hæflinger*, 33 id. 594. The record does not show a filing of the notice of *lis pendens* at or before the entry of judgment. *Haney v. Clark*, 1 Pin. 301; *Manning v. McClurg*, 14 Wis. 350; *Spraggon v. McGreer*, id. 475; *Catlin v. Pedrick*, 17 id. 88; *Webb v. Meloy*, 32 id. 319; *Sage v. McLaughlin*, 34 id. 550; *Mitchell v. Rolison*, 52 id. 155.

For the respondent there was a brief by *Hudd & Wigman*, and oral argument by *Mr. Hudd.*

TAYLOR, J. This action was brought to foreclose a mortgage given by *Daniel Leary* and wife to Cornelius Leary, father of *Daniel Leary*, to secure the payment of $400 and

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interest. A promissory note was given by *Daniel Leary* for the $400, interest at five per cent. The note and mortgage were dated January 1, 1872; the note became due January 1, 1878. The note and mortgage were assigned by the mortgagee, Cornelius Leary, to the respondent, his son, *James Leary*. The mortgage and note were given by *Daniel Leary* to his father in part payment for 160 acres of land conveyed by Cornelius to him.

The answer admits the giving of the note and mortgage and the recording of the same as alleged in the complaint; denies that the note and mortgage were sold, conveyed, or assigned to the plaintiff by said Cornelius Leary; denies that *James Leary* owns the note and mortgage; and alleges that Cornelius Leary is the real party in interest. The answer then alleges full payment of the note and mortgage to Cornelius Leary before the same was assigned to the said *James Leary*, and that said plaintiff had full knowledge of such payment before the same was assigned to him. The answer also alleges a tender of $30 before suit brought, in full payment of the amount remaining unpaid on the note and mortgage. The answer also set up a setoff or counterclaim for board, washing, goods sold, and money loaned, amounting to $700. The case was tried by the court. The main contest on the trial was upon the answer of payment. When the evidence was first closed, the judge found in favor of the defendants that the note and mortgage was fully paid, but, before judgment was entered in the case upon such findings, upon the motion of the plaintiff and upon affidavits showing newly discovered evidence on the part of the plaintiff, the judge ordered that the case be opened for the receipt of further evidence, and thereafter further evidence was received on behalf of both parties, and the court then found in favor of the plaintiff for the whole sum of $400, and interest $270, and ordered judgment of foreclosure for the whole sum of $670 and costs of the action.

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Exceptions were duly taken to the findings of fact and conclusions of law by the defendants, and from the judgment entered the defendants appealed to this court.

The first error assigned is that the plaintiff did not sufficiently prove his title to the note and mortgage. The plaintiff produced in evidence a regular and formal assignment in writing, under seal, of the note and mortgage, and had the same in his possession on the trial. This was ample proof of his right and title to the same, and it was wholly immaterial to the defendant whether he paid money or any other consideration for the same. The assignment was in itself proof of a transfer of the legal title to the note and mortgage; and as in this case there was no claim that the note and mortgage were transferred before the note was due and without notice of defendants' claim of payment and setoff, the defendant could not be injured by having the mortgage foreclosed in the name of *James*. After the plaintiff had shown a legal title in himself, the burden of showing that the action was not brought by the real party in interest was upon the defendant. We find no proof in the case tending to establish that issue in favor of the defendant. The only evidence offered which could be claimed to be at all material on that issue was the offer to show that no money was paid by *James* for the assignment. Had this evidence been admitted it would not have established the fact that the action was not brought by the real party in interest; and as no other evidence was offered on that issue, the judgment should not be reversed, even though the evidence offered would have been competent had it been followed by other evidence tending to show that the plaintiff was a mere nominal party, and not the real party in interest.

It is alleged that the court erred in granting the plaintiff a new trial on account of newly discovered evidence. The court did not grant a new trial. After having announced

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his opinion upon the evidence as it stood when the case was first submitted for his decision, he opened the case for further evidence, upon motion of the plaintiff showing that he had discovered other and material evidence for the plaintiff since the case had been submitted. As the case stood when it was submitted, there can be no doubt that the new evidence was material to the plaintiff's case, and in an evenly-balanced case might be decisive in his favor. We think the court was justified in opening the case for further evidence. The objection that it should have been upon terms of paying costs can have no weight in a case of this kind. It is not like granting a new trial after the verdict of a jury, when all the expense of a new trial is necessary. Here there was no expense placed upon the defendant in opening the case, except the expense of defending against the new evidence which might be produced. He was not put to the expense of producing his witnesses, already examined, again in court for re-examination. There was no error, therefore, in refusing to give the defendant costs on the opening of the case for further evidence.

There are several exceptions taken to the admission of evidence against the objections of the defendant. Without referring to them specifically, we think the objections made were all properly overruled by the court; but had the court received improper evidence against the defendant's objections, still, in a case tried by the court, the reception of such evidence would not be sufficient to reverse the judgment, if upon the whole record, and independent of such improperly received evidence, the findings of the court were sustained.

The real contention of the appellants is that, upon the whole evidence, the court erred in not finding that the note and mortgage were wholly paid by the defendant before the action was commenced, or, if not fully paid, that the tender of $30 covered the whole sum due and more. The mort-

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gagee, Cornelius Leary, was a very old man. At the time of the trial he was nearly or quite blind, and between eighty-four and eighty-five years old, ignorant, and entirely unable to write his name. The defendants produced on the trial receipts for the payment of all the money due on the mortgage for both principal and interest, except $10, and also a paper agreeing that the mortgage debt was settled and paid in full, and that the mortgagee would in a few days bring it to Green Bay and have it discharged. These receipts and agreement were all signed, "CORNELIUS his X mark LEARY," and the defendant and his wife each swore that the money was paid to Cornelius at the date of the receipts, and that he made his mark to each receipt as well as to the settlement. The payment of $250 principal, and $20 interest, December, 1877, was also sworn to by the defendant and his wife and Mrs. Flaherty, a sister of *Mrs. Leary.* The payment of $147.50 was testified to by Kate Leary, a daughter of the defendant, and Katie Flaherty, a niece, and Michael Corrigan, a brother-in-law, of the defendant. They also testify that the receipt and agreement to cancel the mortgage was written by Katie Flaherty. The witness Katie Flaherty was about twelve years old when this receipt bears date, and the witness Kate Leary about thirteen years old at that time; being fifteen and sixteen years old, respectively, on the trial. *Mrs. Leary* and her husband testified that several of the payments, at least five in number, were indorsed upon the note at the time the payments were made, and that the other payments were not indorsed because the father said he had lost the note, or did not have it with him. All payments were claimed to have been paid at the defendants' house, and while Cornelius was living with them in the family. It was claimed that one Michael Smith was present when the $270 was paid, and drew the receipt for that sum, and that he was dead at the time of

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the trial; that one Lemuel Jenkins or Jenkson drew a receipt for a $20 payment made in 1876, and at first the defendant and his wife both testified that this man was also dead, and died in Wrightstown. Afterwards, when it was shown that the Lemuel Jenkins or Jenkson, who died at Wrightstown, was unable to write even his own name, they testified that it was another man of a similar name who wrote the receipt, and they did not know where he was, or whether he was dead or alive.

On the part of the plaintiff it was shown, first, that the note had no indorsements on it of any kind; that the defendant *Daniel Leary* had frequently admitted that he owed his father the amount of the mortgage long after he claimed on the trial to have paid it in full. There was also evidence given on the trial showing that defendant had procured a satisfaction of the mortgage to be drawn up, and called a justice of the peace to have the same executed by the father, and that the father refused to execute the same, claiming that it never had been paid. There was also evidence tending to show that the persons who it was claimed wrote the receipts produced in evidence, did not write them. The father denied that any payment had been made on the mortgage. Upon this testimony, and other circumstances not here stated, but appearing on the record, the learned circuit judge came to the conclusion that no payments had ever been made on the mortgage.

It is evident that the judgment of the court was the result of his judgment as to the credibility of the witnesses who testified in the case. This court is in no position to criticize the judgment of the learned trial judge for his decision upon a question of that kind. His opportunities for judging of the truthfulness of the witnesses who were examined in his presence, are manifestly so much greater than we have from reading the written record that it would be unsafe to reverse the decision of the trial judge upon a

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question of this kind. We might, with equal propriety, reverse the verdict of the jury, which is clearly based upon the credibility which one or the other set of witnesses on the trial should receive. Though there is a mass of evidence given on the part of the defendant to sustain his claim of payment, yet there are attending circumstances which cast grave doubts upon its truthfulness, and tend strongly to the conclusion that most of it was prepared to make a defense to the action, rather than as a truthful statement of the real facts of the case. At all events, the judgment of the circuit judge who tried the case must be upheld by this court, in the absence of a strong preponderance of the evidence against its correctness, and we do not think that there is any such preponderance in this case.

There is nothing in the form of the judgment which should work its reversal. The order of the court directed the usual judgment of foreclosure and sale of the mortgaged premises to satisfy the amount found due, with costs of the action and of the sale, and also a judgment for deficiency if there should be any.

It is insisted the judgment is irregular because it provides that the plaintiff have execution for any deficiency there may be after sale of the mortgaged premises. If the plaintiff should undertake to issue an execution for such deficiency, without first obtaining an order therefor as provided by sec. 3156, R. S., we think the defendant could amply protect himself by a motion to set aside such execution. The order in the judgment that the plaintiff have execution for the deficiency, without stating against whom the execution shall issue, may well be construed to mean that he shall have judgment for such deficiency against the persons liable therefor, as provided in said section. *Huse v. Washburn*, 59 Wis. 414; *Crocker v. Currier*, 65 Wis. 662.

The motion for a new trial made by the defendant after the term at which judgment was entered, cannot be re-

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viewed on appeal from the judgment. *Latimer v. Morrain*, 43 Wis. 107; *Weis v. Schoerner*, 53 Wis. 72; *Morris v. Niles*, 67 Wis. 341. Had the motion been made in time, we think the learned circuit judge would have been justified in refusing to grant it on the changed statement of the old man Cornelius Leary. His evidence given on the trial shows that he was in his dotage, and hardly competent to testify as a witness. We think it improbable that, in the original determination of the case, any considerable weight was given by the learned circuit judge to his evidence, and certainly it was not an abuse of discretion on the part of the judge to refuse to grant a new trial on the strength of any statement he might make in regard to the matter. *Loucheine v. Strouse*, 49 Wis. 623.

The objection that there was no proof of the filing of the *lis pendens* before the court is not sustained by the record. The judge says in his findings of fact that the *lis pendens* was filed, and the judgment not only recites the same fact, but it also recites that due proof of such filing was made. *Mitchell v. Rolison*, 52 Wis. 155; *Sage v. McLaughlin*, 34 Wis. 550; *Webb v. Meloy*, 32 Wis. 319, 324. In this last case it is expressly held that, because the bill of exceptions does not contain the proof of the filing of the *lis pendens*, is no reason for reversing the judgment. This proof need not be given on the trial or be made a part of the bill of exceptions.

It is further insisted by the counsel for the appellants that the court erred in not allowing the defendants' setoff. The only proof of setoff was the evidence of the defendant *Daniel* that he had boarded, lodged, and washed for his father for several years, while his father was living with him. He does not state that there was any agreement, either express or implied, between him and his father that he should have pay for such board, lodging, and washing. In the absence of any such agreement, this court has repeatedly held

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that he could not recover for such board, etc. For all that appears from the evidence, the father lived with his son as a member of his family; and there was no contract between them as to the payment of board, etc., by the father. It it unnecessary to cite authorities to show that the evidence was not sufficient to charge the father with his board, lodging, and washing. The defendant testified to having furnished his father with $2.25 in money, and $3.50 in clothes, and tobacco which he says amounted to $50, but he does not pretend that any account was kept of the same. The father denies that he ever let him have tobacco, but admits that he had the $2.25, and the $3.50 for clothes. These clothes the court might well hold were a gift from the son to his father, as well as the $2.25 given to him when he left his house. As to the tobacco there is hardly sufficient evidence to base a finding upon. We think there was no error committed by the court in refusing, under all the evidence, to allow the defendants these claims. It is, we think, evident that when this money, the clothes, and tobacco were given to the father, if any was given, there was no intention of considering it a debt due from him, any more than there was for considering him liable to pay his son for his board, lodging, etc.

The appellant further insists that the court erred in not striking from the plaintiff's bill of costs certain items charged as fees of his witnesses, and one item for subpœnaing such witnesses. The items were objected to before the clerk, and on his refusal to strike them out the defendant appealed to the court. On such appeal the court struck out a few items which were clearly overcharges, as appeared on the face of the papers, but refused to strike out the charges for the witnesses' fees and for subpœnaing them. It will appear from the objections made before the clerk as well as before the court, that the motion to disallow the claims objected to was not based upon the allegation that the service

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of the subpœna was not performed as charged by the officer, nor that the witnesses' fees paid were not properly chargeable in the case, but on the sole ground that the service of the subpœna and the mileage of the witnesses as taxed were not sufficiently proved by the plaintiff. In the absence of proof to the contrary, we think the return of the constable on the subpœna was evidence of its service and of the officer's fees for serving the same. A constable may serve a subpœna issued out of the circuit court (see sec. 4055, R. S.); and is entitled to the same fees for the service thereof as if served by a sheriff (see sec. 2959, R. S.; *Cutts v. Rock Co.* 58 Wis. 641, 644). The return of a constable to any writ is presumptive evidence that such return is correct; that the service has been rendered or disbursements made. Sec. 3780, R. S. By sec. 2928, R. S., it is also provided that the disbursements of officers for services rendered need not be proven by the affidavit of any one in order to have them taxed. Without some affirmative evidence showing that the charge for serving the subpœna was too much, there was no error in taxing the same.

The charges for witnesses' fees were also properly taxed. The only objection made to taxing the respective sums at which the court and clerk taxed them is that the affidavit of the plaintiff's attorney does not show that they traveled the number of miles in attending as such witnesses taxed in each case. The affidavit says, in general terms, that each witness named in the bill of costs attended the trial of the cause the number of days charged, and traveled the number of miles indicated in said bill. At four cents per mile, the court taxed for just twice the number of miles stated in the bill. In construing the affidavit, the court undoubtedly understood it to mean the number of miles stated as traveled in coming to the place of trial; and as the witness is entitled to travel in returning as well as in coming to the place of trial, the taxation was correct. We may take it for

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granted that the judge had some personal knowledge of the residences of the witnesses, and that he construed the affidavit in the light of such knowledge. At all events, we are not inclined to reverse the judgment because, upon a strict construction of the proof of the attendance and travel of the plaintiff's witnesses, a few dollars too much was taxed, when there is no evidence, and no pretense even, that the witnesses did not in fact travel the number of miles for which they received pay by the taxed bill. So far as appears from the record, no injustice has been done to the defendant in the matter of the taxation of costs. *Meyer v. Foster*, 16 Wis. 294; *Fuller v. Wilcox*, 19 Wend. 351.

By the Court.—The judgment of the circuit court is affirmed.

See note to this case in 32 N. W. Rep. 624.—REP.

KERKHOF, Appellant, vs. THE ATLAS PAPER COMPANY, Respondent.

March 26—April 12, 1887.

Sale of chattels: Statute of frauds: Delivery: Part payment: Special verdict.

1. To take an executory parol contract for the sale of chattels for a price exceeding $50 out of the statute of frauds (sec. 2308, R. S.), where, at the time of the sale, there was no delivery or acceptance or part payment, a subsequent delivery and acceptance must be shown. A subsequent part payment is not sufficient.
2. Ch. 81, Laws of 1883, relating to the sale of personal property, applies only to written contracts, and does not repeal the statute of frauds (sec. 2308, R. S.).
3. A special verdict should cover all material controverted questions.

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APPEAL from the Circuit Court for *Outagamie* County.

Action to recover the purchase price of a quantity of pine cord-wood alleged to have been sold and delivered to the defendant. The facts will sufficiently appear from the opinion. The plaintiff appeals from a judgment dismissing the complaint.

For the appellant there was a brief by *Hudd & Wigman*, and oral argument by *Mr. Hudd.*

Moses Hooper, for the respondent.

COLE, C. J. In this case the plaintiff moved for judgment upon the special verdict. The court denied this motion, and gave judgment dismissing the complaint upon the merits. If the facts found in the special verdict are insufficient to warrant a judgment for the plaintiff, this ruling must be affirmed. The action is brought upon a parol executory contract for the sale and delivery of a quantity of pine cord-wood. The price of the wood amounted to $500 or $600, and the court undoubtedly considered that the contract was within the statute of frauds and the facts found in the special verdict failed to show that the plaintiff was entitled to recover. In that view of the case, we think the court was entirely correct. The jury failed to find upon the question of acceptance. Indeed, that issue was not submitted, probably because there was no evidence of an acceptance of the wood by the defendant. In its answer the defendant put its refusal to accept upon the ground that the wood was purchased for the manufacture of wood pulp for making paper, and that the wood furnished was unfit for that purpose. The jury, however, found that the plaintiff cut, hauled, and banked at the place designated on the Fox river, 230 cords of dead wood, of the quality specified in the contract. The jury also found that after 200 cords of wood had been banked the defendant paid $250 towards the wood, but that it did not then know the quality of the

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wood which had been banked. This is the substance of the special findings. It will be observed that the verdict is silent on the material issue of the acceptance or non-acceptance of the wood by the defendant. Under the circumstances, it was essential for the plaintiff to prove, and for the jury to find, an acceptance to take the case out of the statute. Every special verdict should submit all material controverted facts. *Pratt v. Peck*, 65 Wis. 463, and cases cited in the opinion. As has been said, the contract was a parol executory one, for the sale of wood for a price exceeding $50. Nothing was paid, at the time the agreement was entered into, upon the purchase money. The contract came precisely within sec. 2308, R. S., and was void if that statute is now in force, or unless the contract was fully executed by delivery and acceptance. This point has been so often ruled by this court that it is necessary to refer to only a few of the decisions upon it: *Smith v. Stoller*, 26 Wis. 671; *Nichols v. Mitchell*, 30 Wis. 329; *Bates v. Chesebro*, 32 Wis. 594, and 36 Wis. 636; *Paine v. Fulton*, 34 Wis. 83; *Mason v. H. Whitbeck Co.* 35 Wis. 164; *Pike v. Vaughn*, 39 Wis. 500; *Bacon v. Eccles*, 43 Wis. 227; *Hanson v. Roter*, 64 Wis. 622. Therefore the necessity of proving an acceptance of the wood so as to pass title and show a complete performance of the contract is apparent. In no other way could the written memorandum of sale be dispensed with. But the fact of such an acceptance was not shown, nor was that question submitted to the jury, as it should have been, on proper proof.

Upon the special verdict, then, the plaintiff was clearly not entitled to have judgment for the value of the wood, since no acceptance was shown so as to complete the sale. It cannot well be said that the payment of the $250 some weeks after the contract was made would have the effect to validate the agreement or take the case out of the statute. The earnest money to bind the bargain must be paid

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"*at the time*" the contract is entered into. *Bates v. Chesebro, Paine v. Fulton, Hanson v. Roter, supra.* The defendant had not seen the wood when the payment was made, knew nothing about its quality, and did nothing from which an acceptance of the property might be inferred. It is suggested in the brief of the counsel for the plaintiff that the presumption is that the defendant owned or leased the landing where the wood was piled, so that it was actually in its possession. But there is no testimony to support such a presumption or inference. It appears that the wood was piled where designated, somewhere on the east bank of the Fox river. This is all the evidence there is upon the subject.

The same counsel makes the further point that the agreement is valid under ch. 81, Laws of 1883, relating to the sale of personal property. To our minds it is very evident that this law refers to written contracts, because it enacts that "it shall be incompetent to show in defense, by any extrinsic evidence, that such contract had any other intent or meaning than expressed or stipulated thereby." As the counsel on the other side suggests, this law was doubtless passed to obviate, in a measure, the decisions in *Barnard v. Backhaus*, 52 Wis. 593, and *Everingham v. Meighan*, 55 Wis. 354, and to validate "options or dealings in futures, or betting on the rise and fall of stocks and produce." It has no application to the contract before us. According to the view of counsel, it has the effect to repeal the statute of frauds. We do not think it was ever intended by the legislature to have any such sweeping effect.

It follows from these views that the judgment of the circuit court must be affirmed.

By the Court.— Judgment affirmed.

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SCHROTH, Respondent, vs. THE CITY OF PRESCOTT, Appellant.

March 26 — April 12, 1887.

Municipal corporations: Defective sidewalk: Court and jury: Excessive damages.

1. The questions in the case, whether the hole in the sidewalk which caused the fall and injury of the plaintiff was such a defect as to render the city liable for such injury, and whether the city had notice of such defect, are *held* to have been properly submitted to the jury.
2. A verdict awarding $966.66 to a laboring woman whose leg was broken and permanently injured by reason of a defective sidewalk, *held* not excessive.

APPEAL from the Circuit Court for *Pierce* County.

The cause was before this court on a former appeal, and is reported in 63 Wis. 652. The plaintiff's leg was broken by her fall, and the evidence tended to show that as the result of her injury she was confined to her bed for three weeks, and was obliged to go upon crutches for three months; that she suffered a great deal of pain during that time, and still suffers during a change of the weather; and that the injury will to some extent be permanent. The plaintiff earned her living by doing washing. Other facts will appear from the opinion. There was a verdict for the plaintiff for $966.66, and from the judgment entered thereon the defendant appealed.

E. H. Ives, for the appellant.

For the respondent there was a brief by *Gilson, Smith & Haugen*, and oral argument by *Mr. Gilson.*

TAYLOR, J. This is an action to recover damages of the city for an injury to the respondent, caused by falling upon the sidewalk of one of the principal streets of said city. The respondent claims that she fell because her foot became

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fastened in a hole or depression in the walk, and that she was severely injured by such fall. There is no dispute about the fact of her falling on the walk and injuring herself. The only material questions of fact in the case are whether she fell by reason of getting her foot fastened in the hole or depression in the walk, and, if she did, whether such hole or depression in the walk was such a defect as renders the city liable for an accident so resulting therefrom. It is also urged by the appellant that there was not sufficient evidence in the case to charge the city with notice of the defect, if there was one, in the walk before the accident happened.

The learned counsel for the appellant has prepared a very full and fair statement of the whole evidence in the case, and he insists that, upon a fair consideration of that evidence, this court should hold that the plaintiff has utterly failed to make out a case against the city. He makes his points — (1) that there was not a defect in the walk such as should charge the city with negligence; and (2) that the evidence fails to show that the city had notice of the alleged defect before the accident happened.

This case was in this court upon a former appeal (63 Wis. 652), and this court then held that there was sufficient evidence then produced to carry the case to the jury both upon the question of the defect in the walk and notice thereof to the city. By an examination of the evidence as presented by the record on the former appeal, it will be seen that it certainly did not make any stronger, and, in some respects, not as strong a case in favor of the plaintiff upon these questions as the evidence in the present case.

The evidence in this case shows that the sidewalk was made of two-inch planks laid lengthwise with the walk; that, at the place where the plaintiff fell, the edge of one of the planks had rotted away for a space of from two and a half to three inches in width and of a depth of an inch to

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an inch and a half, extending lengthwise about a foot or more; that this defect had remained nearly in the same condition for several weeks before the accident; and that sometimes the depression would be filled with dirt, so that it was not very visible, but after a rain the dirt would be washed out and the defect become quite visible. The evidence also shows that, just before the time the accident happened, there had been considerable rain, and the dirt had been washed out of the depression or hole in the walk. The plaintiff testifies that she stepped into the hole or depression in the walk, and that her shoe became fastened in the hole, and in trying to extricate her foot she fell and was injured. It is urged by the learned counsel for the appellant that it was impossible that her foot could have been caught or fastened in the hole, and that the fair inference to be drawn from the evidence is that she slipped upon the wet sidewalk upon the decline in the same, about eight inches from the hole, and that was the cause of her fall, and not the hole in the walk. This was a very fair argument to address to the jury upon the evidence, but can have no weight with this court upon an appeal from the verdict and judgment. It presents a pure question of fact,—one that, under the ruling of this court on the former appeal, the trial court was bound to submit to the jury, and upon which their verdict must be conclusive unless the circuit court in its discretion should see fit to set aside their verdict and grant a new trial.

The evidence upon the question of notice to the city was clearly sufficient to send that question to the jury also.

The jury having found that the sidewalk was defective, and that the city had notice of the defect, or that the defect had existed for such a length of time that it ought to have had knowledge of it, the plaintiff has clearly made out a case against the city, and it was not error for the circuit court either to refuse to nonsuit the plaintiff or to set aside

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the verdict. Neither the circuit court nor this court has the right to say, as a matter of law, that the defect in the walk shown by the evidence was not such a defect as should render the city liable for an injury resulting therefrom. This court so held on the former appeal, and that ruling is clearly supported by the authorities. *Schroth v. Prescott*, 63 Wis. 652; *Ghenn v. Provincetown*, 105 Mass. 313; *Sheel v. Appleton*, 49 Wis. 125, 128; *Klatt v. Milwaukee*, 53 Wis. 196, 206.

The case was fairly submitted to the jury under the instructions of the court, to which no exceptions were taken by the appellant, and by which all the material issues in the case were clearly presented to the jury for their consideration. At the request of the defendant, the court instructed the jury as follows: "Unless the sidewalk in question was defective to that degree that it was thereby rendered unsafe to those passing thereon, they using due and ordinary diligence and care in so doing, the city is not liable." "Unless the defect was such that ordinary diligence on the part of the city officers whose duty it was to keep the walk in repair would have discovered it, the city is not liable." These two material propositions were enlarged upon by the learned judge in his instructions to the jury, so that it was very clear that all the rights of the city were fairly protected by the judge in his charge, and they were apparently entirely satisfactory to the learned counsel for the city.

No complaint is made by the learned counsel, in his brief or in his argument before this court, that there was any error in refusing to give an instruction asked by him and which the court refused to give. And it is evident that the special instruction refused was, so far as it was proper to give the same, given in the general charge.

The only questions raised by the learned counsel for the appellant were questions of fact arising upon the evidence.

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and which, as said above, were questions properly submitted to the jury; and they having found against the appellant, there was no error in refusing to set aside the verdict and grant a new trial. There is no force in the objection that the damages were excessive.

By the Court.—The judgment of the circuit court is affirmed.

STEBBINS, Respondent, vs. KILLEEN, Appellant.

March 26—April 12, 1887.

Appeal: Evidence to sustain verdict.

Where a judgment rendered in justice's court upon the verdict of a jury is affirmed by the circuit court without a trial *de novo*, this court will not reverse the judgment if the evidence tended to support it and the credibility of witnesses was in question.

APPEAL from the Circuit Court for *Kenosha* County.

The facts are sufficiently stated in the opinion.

The cause was submitted for the appellant on the brief of *Myron A. Baker*, attorney, and *Howard Van Wyck*, of counsel, and for the respondent on that of *Charles Quarles*.

ORTON, J. The respondent brought this suit against the appellant, in a justice's court, to recover the sum of $8.50, of which sum $5.50 was for goods sold and delivered, and $3 was for legal and professional advice. The defendant answered, in effect, that the goods were sold to him to apply on an account which he had against the firm of Brown & Gaffrey, the former owners of the stock of goods finally sold to the plaintiff, and that the plaintiff had assumed to pay it, and that he never had such legal advice. The issues were tried by a jury, and they found for the plaintiff $2.50. From the

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judgment of the justice thereon, the defendant appealed to the circuit court and said judgment was affirmed. From said judgment of the circuit court, the defendant appealed to this court. No errors are assigned except that said judgment is against the law and evidence. In such a case the judgment will not be reversed if the plaintiff's evidence tended to support it (*Lyle v. Dellinger*, 54 Wis. 404); or when the evidence was sufficient to sustain it (*Rood v. Am. Exp. Co.* 46 Wis. 639); or when the questions of fact were fairly submitted to a jury upon conflicting evidence (*Chamberlain v. Dickey*, 31 Wis. 68; *Jaquish v. Ithaca*, 36 Wis. 108; *Caswell v. C. & N. W. R. Co.* 42 Wis. 193).

In this case, the evidence on behalf of the plaintiff, if it had not been contradicted or rebutted by the defendant, was sufficient to entitle the plaintiff to recover; that is sufficient for affirming the judgment. The evidence was very conflicting, and the credibility of the witness was in question, and it was peculiarly a case for a jury, and their verdict is conclusive.

We think the circuit court committed no error in affirming the judgment of the justice, and therefore the judgment of the circuit court is affirmed.

By the Court.— Judgment affirmed.

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INDEX.

ABATEMENT OF ACTION.

See CRIMINAL LAW, 2.

1. The fact that an action is prematurely brought should be pleaded in abatement. *Collette v. Weed,* 428
2. Where all of a lot of logs should have been scaled before an action was brought for the shortage, and the plaintiff had caused all that he was able to find to be so scaled, the fact that a few more were discovered after the commencement of the action should not defeat the action, especially where that fact was pleaded not by way of abatement but as a defense on the merits. *Ibid.*

ACCEPTANCE. See SALE OF CHATTELS, 2, 6.

ACCORD AND SATISFACTION.

In an action for a balance due upon contract for labor and materials, the defendants pleaded an adjustment and settlement in writing and full payment thereunder. *Held:*

(1) On the trial the plaintiff might avoid the alleged settlement by showing that his signature thereto was obtained by fraud.

(2) The amount paid to the plaintiff under the settlement having been conceded by the defendants to be due to him, he was not bound to return it in order to rescind the settlement. *Leslie v. Keepers,* 123

ACCOUNT BOOKS as evidence. See EVIDENCE, 1.

ACTION.

(A.) *Cause of Action.*

See BANKRUPTCY, 4. CHATTEL MORTGAGES, 2. CONTRACTS, 1-3, 5-7. CONVERSION. DEBTOR AND CREDITOR, 1, 2, 11. DEED. EVIDENCE, 3. HIGHWAYS, 1, 5. JOINDER. LANDLORD AND TENANT, 2-6. LIENS. LOGS AND TIMBER, 3. MUNICIPAL CORPORATIONS, 3. NAVIGABLE RIVERS. NEGLIGENCE, 2, 3. OFFICERS. PARENT AND CHILD. PARTIES. PATENTS. PAUPERS. PLEADING. RAILROADS, (B.), (C.). RECEIVERS. VENDOR AND PURCHASER, 5, 6. VOLUNTARY ASSIGNMENT, 1.

(B.) *By whom to be brought.*

See CHATTEL MORTGAGES, 2. DEBTOR AND CREDITOR, 1, 2. PARTIES. RECEIVERS, 2. VOLUNTARY ASSIGNMENT, 1.

(C.) *Commencement.*

See LIMITATION OF ACTIONS. TAX TITLES, 3, 4.

(D.) *Abatement.*

See ABATEMENT OF ACTION.

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(E.) *Nature of Action.*
See JOINDER. ROCK COUNTY MUNICIPAL COURT.

(F.) *Law or Equity?*
See LIENS, 2.

(G.) *Tort or Contract?*
See PLEADING, 7.

(H.) *Various Actions and Proceedings.*

Against a County.
To enforce lien of subcontractor on bridge, 123.

Against a City.
For causing death of person by negligence, 50.
For damages from unlawful change of grade of street, 241.
For injuries to person from defective sidewalk, 678.

Against a Town.
For support of pauper, 192.
To restrain the incurring of expense or issuance of town orders in anticipation of levy of unlawful highway tax, 546.

Against Public Officers.
Sheriff. For conversion of chattels, 497, 563. To restrain proceedings to collect judgment, 587.
Town officers. To restrain issuance of town orders in anticipation of unlawful highway tax, 546.
Town Supervisors. *Mandamus* to compel opening of highway, 158. To set aside proceedings in laying out ditch, 248. *Mandamus* to compel appointment of appraisers, etc., 502.
Town Treasurer. *Mandamus* to compel acceptance of license fee, etc., 135. For conversion of chattels, 608.

Against a Railroad Company.
Condemnation of land, 180.
For causing death of person by negligence, 184.
Garnishment, 212.
For assault and battery by employee, 469.
For injuries to person from negligence, 474, 520, 616.

Against an Insurance Company.
On a fire policy, 298, 510.

Against a Bank.
Replevin, 234.

Against other Private Corporations.
For balance of purchase price of land, 34.
To enforce lien for services on lumber, 89.
For purchase price of chattels, 112, 674.
On judgment, 231.
For breach of warranty of harvester, 612.

Against Estates of Decedents, Executors, Administrators, etc.
Ejectment, 24.
Claim against decedent for money had and received, 153.
Claim against decedent on foreign judgment, 215.

Against a Receiver.
Petition for leave to sue receiver, 44.

Against Assignee for Benefit of Creditors.
Garnishment, 442.

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By the State.
Mandamus to town officers, 135, 158, 502.
Information for injunction against obstruction of navigable river, 165.
Complaint for selling liquor without license, 400, 538.
Information for burglary, 416.
Information for murder, 530.

By a Town.
For expense of supporting pauper, 192.

By a School District.
Replevin, 246.

By Public Officers.
Overseer of poor house and county asylum. To recover reward for return of insane person, 384.

By a Bank.
Petition for leave to sue a receiver, 44.
On promissory notes, 390.
Garnishment, 442.

By other Private Corporations.
For specific performance of contract to assign invention, 73.
Garnishment, 296.
On promissory notes, 577, 612.
For conversion of chattels, 608.

By Executors or Administrators,
Upon a certificate of deposit, 16.
For death caused by negligence, 50, 184, 271.
To set aside conveyance of land, 150.
To foreclose mortgage, 256.
To probate will, 372.
For conversion of chattels, 505.

By an Assignee for Benefit of Creditors.
Replevin, 234.
For conversion of chattels, 497.

Actions arranged according to their subject matter.
On a judgment, 215, 231.
On policy of insurance against fire, 298, 510.
On a certificate of deposit, 16.
On promissory notes, 390, 436, 458, 577, 603, 612.
To recover rent, 309.
For breach of covenants of seizin, etc., 626.
For breach by lessor of covenants of lease, 309.
To recover reward offered, 384.
For breach of written warranty on sale of chattels, 428, 612.
For balance of purchase price of land under oral agreement, 34.
For purchase price of chattels, 1, 112, 176, 380, 465, 555, 674, 682.
On express oral contract to pay debt of another, 454.
For commissions on sale by agent, 412.
For contract price for labor and materials, 123, 312, 425.
For value of chattels (conversion waived), 624.
For value of services, etc., 61, 380.
For money had and received, 152.
To recover amount paid on judgment, 657.
To recover double the expense of rebuilding partition fence, 491.
For expense of supporting pauper, 192.
For breach of oral contract to form partnership, etc., 344.
For breach of oral contract not to enter into certain business, 436.

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For trespass and unlawful cutting of timber, 133, 358, 461.
For injury to land from unlawful change of grade of street, 241.
For conversion of chattels, 497, 505, 563, 608, 619.
For death of person from negligence, 50, 184, 271.
For an assault and battery, 405, 451, 469.
For injuries to person from negligence, 474, 520, 616, 678.
Ejectment, 12, 24, 317.
Forcible entry and unlawful detainer, 162.
Replevin, 220, 227, 234, 246.
Garnishment, 196, 212, 278, 294, 296, 408, 442.
Condemnation of land for railroad, 180.
Mandamus to compel acceptance of license fee, etc., 135.
Mandamus to compel opening of highway, 158.
Mandamus to compel appointment of appraisers, 502.
Probate of will, 372.
Claims against decedents, 152, 215.
For a divorce, 303.
Petition for leave to sue receiver, 44.
Intervention, in nature of creditors' action, 336.
To enforce contribution from co-surety, 390.
To have judgment declared satisfied, etc., 390.
To foreclose mortgage, 145, 256, 662.
To foreclose tax certificates, 202.
To enforce lien for labor on lumber, cord-wood, etc., 89, 212.
To enforce lien of subcontractor on bridge, 123.
To remove cloud upon title, 128, 651.
To set aside conveyance of land, 150.
To set aside proceedings in laying out ditch, 248.
To restrain obstruction of navigable river, 165.
To restrain incurring of expense or issuance of town orders on faith of illegal highway tax, 546.
To restrain collection of judgment, 587.
For specific performance of contract to assign invention, 78.
For specific performance of contract for sale of land, 364.
Complaint for selling liquor without license, 400, 538.
Information for burglary, 416.
Information for murder, 530.

ADMINISTRATORS AND EXECUTORS. See HIGHWAYS, 1. LIMITATION OF ACTIONS, 2. WILLS.

ADMISSIONS. See CRIMINAL LAW, 2, 8. EVIDENCE, 5, 14, 15.

ADVERSE POSSESSION.

K. purchased a strip of land twenty-five feet wide and erected thereon a building which extended a few inches upon the adjoining land. Subsequently he conveyed to G. by a deed describing the land as twenty-five feet. *Held*, that G. could have no benefit of K.'s adverse possession of the strip occupied by the building beyond the line of the land conveyed. *Graeven v. Dieves*, 317

AFFIDAVIT.
Of attendance of witnesses. See COSTS, 6.
Of publication of notice of tax sale. See TAX TITLES, 1, 5.
Of posting of notice of tax sale. See TAX TITLES, 2.

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AGENCY.

See CONTRACTS, 4. EXCISE LAWS, 2. MARRIED WOMEN, 2. RAILROADS, (B.). VENDOR AND PURCHASER, 4. VERDICT, 1.

1. The deceased had received $1,500 from the plaintiff, giving her his due-bill therefor, and had afterwards repaid $300, and loaned $1,200 to a company, taking its note therefor payable to the plaintiff. Upon the evidence (stated in the opinion) it is *held* that he had no authority as agent of the plaintiff to make such loan on her behalf, and that his estate was liable for the repayment of the $1,200. *Kelly v. Estate of Strong,* 152

2. An agent employed to sell has no implied power to warrant unless the sale is one which is usually attended with warranty. *Pickert v. Marston,* 465

ALIMONY. See DIVORCE.

AMENDMENT.
Of judgment. See JUDGMENT, 5, 6.
Of pleading. See ASSAULT AND BATTERY, 2. PLEADING, 5.
Of return of execution. See REPLEVIN, 1.

ANNUITY TABLES. See EVIDENCE, 4.

ANSWER. See ABATEMENT. ACCORD. ASSAULT AND BATTERY, 1. CRIMINAL LAW, 2. INSURANCE, 4. PLEADING, 3, 6.

APPEAL.

(A.) *Generally.*
See EVIDENCE, 18. PAYMENT.

(B.) *To Supreme Court.*
See APPEALABLE ORDER. COSTS, 1, 2, 6. CRIMINAL LAW, 8, 9. EVIDENCE, 6, 8, 9, 11, 12. JUDGMENT, 1, 2, 7. LANDLORD AND TENANT, 2. MORTGAGES, 7. NEW TRIAL, 2. PLEADING, 6.

1. Unless the findings of fact are excepted to in writing and such exceptions are inserted in the bill of exceptions, the sufficiency of the evidence to sustain the findings cannot be inquired into on an appeal from the judgment. So *held* in a case where the findings were announced orally and the appellant had no knowledge that written findings had been made and filed until the bill of exceptions was made up, and no notice of the entry of judgment had been served on him. *Saukville v. Grafton,* 192

2. Under sec. 3049, R. S., the notice of an appeal from an order or judgment need not specifically state that it is "from the whole thereof." *Irvin v. Smith,* 220

3. There were two appeals by the same party in one cause, and the printed case on one appeal was identical with the first ninety-one pages of the printed case on the other appeal. *Held,* that in taxing costs the appellant should be allowed for only one printed case on both appeals. *Irvin v. Smith,* 227

4. A judgment is not appealable until the costs have been taxed and inserted therein or until the time limited by statute for so perfecting the judgment has expired. *Joint School Dist. v. Kemen,* 246

5. When it is alleged as error that the trial court refused to strike out hearsay evidence given by a witness on his cross-examination by appellant's counsel, the record should show whether or not such testimony was responsive to the question asked. *Colclough v. Niland,* 309

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6. The reasons for granting a new trial, as delivered in writing by the trial judge, are not a part of the record unless they are shown by the certificate to the bill of exceptions to have been made a part thereof. *Mullen v. Reinig*, 408

7. A verdict found upon evidence which is contradictory, or the credibility of which is questioned, will not be disturbed on appeal unless there is a clear preponderance of evidence against it. *Marshall v. Holmes*, 555

8. The mere refusal of the court to state certain facts to the jury, though they were undisputed, is not ground for a reversal of the judgment. *Brickley v. Walker*, 563

9. The refusal to give an instruction asked is not ground for a reversal of the judgment, if it was substantially given in the general charge. *Ibid.*

10. A verdict will not be set aside as against evidence, if the evidence, though conflicting and contradictory, was if believed by the jury sufficient to sustain it. *Plano Mfg. Co. v. Frawley*, 577

11. An exception to the whole of an instruction is not available on appeal, if it was in part correct. *C. Aultman & Co. v. Case*, 612

12. Same point. *Hulehan v. G. B., W. & St. P. R. Co.* 590

13. The exclusion of proper evidence which, though admitted, would not, in the absence of other evidence, have established the fact sought to be proved, is not sufficient ground for reversing the judgment. *Leary v. Leary*, 662

14. The admission of improper evidence against objection, in a case tried by the court, is not sufficient ground for reversing the judgment if, upon the whole record, independent thereof, the findings of the court are sustained. *Ibid.*

15. A motion for a new trial, made after the term at which judgment was entered, cannot be reviewed on appeal from such judgment. *Ibid.*

16. Where a judgment rendered in justice's court upon the verdict of a jury is affirmed by the circuit court without a trial *de novo*, this court will not reverse the judgment if the evidence tended to support it and the credibility of witnesses was in question. *Stebbins v. Killeen*, 682

(C.) *From Justices' Courts.*

See APPEAL (B.), 16. COSTS, 1. EVIDENCE, 18. ROCK COUNTY MUNICIPAL COURT.

Where a justice's judgment for less than $15 is affirmed, a readjudication by the appellate court that the respondent recover the amount of such judgment together with interest thereon from the time of its rendition, will not be deemed a new judgment or anything more than a simple affirmance. *Wold v. Ordway*, 176

APPEALABLE ORDER.

See PLEADING, 6.

1. An appeal will not lie from an order made by a judge at chambers. *Whereatt v. Ellis*, 61

2. A mere order for judgment is not appealable. *Joint School District v. Kemen*, 246

APPORTIONMENT. See VENDOR AND PURCHASER, 5.

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ASSAULT AND BATTERY.

See RAILROADS (B.), 1.

1. Justification for an assault and battery should be specially pleaded. *Atkinson v. Harran*, 405

2. In an action for an assault and battery, although special damages are not alleged, yet, if evidence thereof was admitted without objection it may be considered by the jury, and the complaint may be considered as amended accordingly. *Ibid.*

3. In an action of assault and battery the evidence tended to show that when the defendant asked the plaintiff why the latter had slandered him the plaintiff immediately thrust his hand into his pocket and was about to draw it out again when the defendant knocked him down; and that the defendant had been warned that the plaintiff had threatened to inflict personal injury upon him and was a dangerous man and in the habit of shooting people. *Held*, that the question whether the defendant was justified in striking the plaintiff to prevent the latter from attacking him, should have been submitted to the jury. *Keep v. Quallman*, 451

4. Evidence of the quarrelsome and violent disposition of the plaintiff was admissible in such a case. *Ibid.*

ASSESSMENT.
Of advantages, etc. See HIGHWAYS, 2.
Of highway taxes. See HIGHWAYS, 6, 7.
Of taxes. See TAX TITLES, 3, 4.

ASSIGNMENT.
For benefit of creditors. See VOLUNTARY ASSIGNMENT.
Of cause of action. See PARTIES.
Of judgment. See SURETYSHIP.
Of note and mortgage. See EVIDENCE, 5. PARTIES, 2, 3.
Of patent. See PATENTS.
Of rent. See LANDLORD AND TENANT, 6.

ATTACHMENT. See CONVERSION, 1. HOMESTEAD, 1.

ATTORNEY AT LAW. See CRIMINAL LAW, 8-11. EVIDENCE, 12, 14, 15. MUNICIPAL CORPORATIONS, 1. VOLUNTARY ASSIGNMENT, 8.

BANKRUPTCY.

1. The granting of a discharge in bankruptcy is conclusive that any delay occurring in the proceedings was sufficiently excused. *Leonard v. Yohnk*, 587

2. A discharge in bankruptcy operates to release a judgment obtained against the bankrupt, pending the bankruptcy proceedings, upon a claim which was proved or provable therein, as well as the claim itself, and the creditor cannot enforce such judgment against the bankrupt's after-acquired property. *Ibid.*

3. Such a claim, which has been proved in the bankruptcy proceedings, does not become merged in such judgment, and the subsequent filing of the judgment is but a re-filing of the same claim. *Ibid.*

4. A bankrupt, against whom a judgment so obtained is sought to be enforced by execution, is not bound to seek his remedy by motion for a stay of proceedings in the suit in which the judgment was rendered, as provided by sec. 5106, R. S. of U. S., but may, before obtaining his discharge, bring an action in equity to restrain pro-

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ceedings on execution under such judgment; and, after obtaining his discharge, may obtain leave of court to file a supplemental complaint setting up the discharge, and obtain a perpetual injunction against such proceedings. *Ibid.*

BANKS AND BANKING. See BILLS AND NOTES.

BILL OF EXCEPTIONS. See APPEAL (B.), 1, 5, 6, 11, 12. MORTGAGES, 7.

BILLS AND NOTES.

See PARTNERSHIP. PLEADING, 5. SURETYSHIP.

A certificate of deposit issued by a banker in the ordinary form of such instruments is, in substance and legal effect, a negotiable promissory note. *Curran v. Witter,* 16

BOOKS OF ACCOUNT. See EVIDENCE, 1.

BURDEN OF PROOF. See DEBTOR AND CREDITOR, 7. PARTIES, 3. RAILROADS (B.), 3. WILLS, 3.

BURGLARY. See CRIMINAL LAW, 3-7.

CAPACITY. See WILLS.

CASES CRITICISED, DISTINGUISHED, ETC.

1. *Bartelt v. Braunsdorf*, 57 W. 3. See No. 23.
2. *Chapman v. Wadleigh*, 33 W. 267. See No. 8.
3. *Chas. Baumbach Co. v. Miller*, 67 W. 195. See No. 17.
4. *Cole, Will of*, 49 W. 179 (as to burden of proof of sanity),—a remark in the opinion explained. *Will of Silverthorn,* 379
5. *Congar v. Chamberlain*, 14 W. 258; *Morehouse v. Comstock*, 42 W. 626 (as to consideration for warranty), distinguished. *Collette v. Weed,* 433
6. *Cummings v. Nat. Furnace Co.* 60 W. 603 (as to presumption of negligence), distinguished. *Miller v. C., M. & St. P. R. Co.* 189, 190
7. *Delorme v. Ferk*, 24 W. 201; *Meade v. Gilfoyle*, 64 W. 18 (as to description of land in tax deeds), distinguished. *Murphy v. Hall,* 208
8. *Dobbs v. Enearl*, 4 W. 451; *Hall v. Hinckley*, 32 W. 362; *Rees v. Ludington*, 13 W. 276; *Chapman v. Wadleigh*, 33 W. 267; *Lampson v. Bowen*, 41 W. 484; *Hewett v. Currier*, 63 W. 386; *Paine v. Woodworth*, 15 W. 298 (as to liens), distinguished, and *dicta* therein criticised. *Smith v. Shell Lake Lumber Co.* 90-94
9. *Docter v. Hellberg*, 65 W. 424. See No. 23.
10. *Engmann v. Estate of Immel*, 59 W. 249 (as to revival of debt by part payment), approved. *Marshall v. Holmes,* 559
11. *Hall v. Hinckley*, 32 W. 362. See No. 8.
12. *Hammel v. Schuster*, 65 W. 669 (as to official action by county judge who drew assignment papers), distinguished. *Fuhrman v. Jones,* 501
13. *Hewett v. Currier*, 63 W. 386. See No. 8.
14. *Hogan v. C., M. & St. P. R. Co.* 59 W. 139 (as to when averment or finding of negligence is a mere conclusion of law), distinguished. *Washburn v. C. & N. W. R. Co.* 481

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15. *Hoile v. Bailey*, 58 W. 434; *Kollock v. Parcher*, 52 W. 399 (as to statute of frauds), distinguished. *Willard v. Bosshard*, 457

16. *Jackson v. State*, 55 W. 589 (as to proof of title, in burglary), distinguished. *Nicholls v. State*, 424

17. *Kloeckner v. Bergstrom*, 67 W. 197; *Chas. Baumbach Co. v. Miller*, id. 449 (as to rights of assignee), followed. *Frost v. Citizens' Nat. Bank*, 234, 240

18. *Kollock v. Parcher*, 52 W. 399. See No. 15.

19. *Lampson v. Bowen*, 41 W. 484. See No. 8.

20. *Lawson v. Schnellen*, 33 W. 288; *Phillips v. Albany*, 28 W. 340; *Lynch v. E., L. F. & M. R. Co.* 57 W. 430; *Nevil v. Clifford*, 55 W. 161; *Willard v. Comstock*, 58 W. 565 (as to injunction against town or county officers), distinguished. *Sage v. Fifield*, 551, 552

21. *Lynch v. E., L. F. & M. R. Co.* 57 W. 430. See No. 20.

22. *Meade v. Gilfoyle*, 64 W. 18. See No. 7.

23. *Messer v. Oestreich*, 52 W. 696; *Bartelt v. Braunsdorf*, 57 W. 8; *Docter v. Hellberg*, 65 W. 424 (as to measure of damages),—a clerical error corrected. *Semple v. Wharton*, 627, 636

24. *Morehouse v. Comstock*, 42 W. 626. See No. 5.

25. *Nevil v. Clifford*, 55 W. 161. See No. 20.

26. *Olinger v. Liddle*, 55 W. 621 (as to notice of appeal), distinguished. *Irvin v. Smith*, 223

27. *Paine v. Woodworth*, 15 W. 298. See No. 8.

28. *Phillips v. Albany*, 28 W. 340. See No. 20.

29. *Rees v. Ludington*, 13 W. 276. See No. 8.

30. *Sarbecker v. State*, 65 W. 171 (as to sale of intoxicating liquors), distinguished. *Peitz v. State*, 543

31. *Scanlan v. Childs*, 33 W. 663 (as to sale of liquors by manufacturer), distinguished. *Peitz v. State*, 538, 542

32. *Webster v. Phœnix Ins. Co.* 36 W. 67 (as to waiver of forfeiture), distinguished. *Bonneville v. Western Ass. Co.* 302

33. *Willard v. Comstock*, 58 W. 565. See No. 20.

CAUSE OF ACTION. See ACTION (A.).

CENSUS.

See EXCISE LAWS, 1.

Ch. 58, Laws of 1885, was repealed by ch. 161, Laws of 1885. As the latter act does not provide for an enumeration of the inhabitants of an unincorporated village separate from the town in which it is situated, an omission to make such separate enumeration does not render the taking of the census improper or insufficient within the meaning of sec. 11 of the act, and such omission cannot be supplied under that section. *State ex rel. Terry v. Keaough*, 185

CERTAINTY.
In description of chattels. See CHATTEL MORTGAGES, 1.
In description of land. See TAX TITLES, 6.
In pleading. See PLEADING, 6.

CERTIFICATE OF DEPOSIT. See BILLS AND NOTES. LIMITATION OF ACTIONS, 1.

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CHANGE OF VENUE.

An application for a change of the place of trial on the ground of prejudice of the judge, made after the cause has been referred and the referee has made his report, is too late. *Duffy v. Hickey*, 380

CHARGING THE JURY. See INSTRUCTIONS TO JURY.

CHATTEL MORTGAGES.

See FRAUDULENT CONVEYANCES.

1. Where the mortgagor identifies and delivers to the mortgagee certain property as being that covered by a chattel mortgage, and the mortgagee takes full possession thereof with the consent of the mortgagor before the execution by the latter of an assignment for the benefit of his creditors, any insufficiency or want of certainty in the description of the property in the mortgage is thereby cured, both as against the mortgagor and his assignee for the benefit of creditors, the latter having only the same rights in this respect as his assignor. *Frost v. Citizens' Nat. Bank*, 234
2. A mortgagor of chattels may maintain an action for the conversion thereof against any one not claiming as or under the mortgagee. *Brickley v. Walker*, 563

CITIES. See MUNICIPAL CORPORATIONS.

CLAIMS. See AGENCY, 1. ESTATES OF DECEDENTS. HIGHWAYS, 4.

CO-EMPLOYEES. See RAILROADS (B.), 2.

COMPETENCY.
Of person to make a will. See WILLS.
Of witnesses. See EVIDENCE, 14, 15. WILLS, 2.

COMPLAINT. See ASSAULT AND BATTERY, 2. BANKRUPTCY, 4. CONVERSION, 2. DEBTOR AND CREDITOR, 1, 2. JOINDER (A.). JUDGMENT, 4. PLEADING, 1, 2, 4, 5, 7. RAILROADS (C.), 2–4.

COMPUTATION of time. See TAX TITLES, 1, 5.

CONDEMNATION of land. See HIGHWAYS, 2–4. RAILROADS (A.).

CONDITION.
In contract. See CONTRACTS, 4.
In insurance policy — Waiver. See INSURANCE, 1, 7.
Precedent to satisfaction of mortgage. See MORTGAGES, 4.

CONFUSION. See LOGS AND TIMBER, 3.

CONSIDERATION. See LIMITATION OF ACTIONS, 3. MORTGAGES, 2. OFFICERS. PARTIES, 2. SALE OF CHATTELS, 4. VENDOR AND PURCHASER, 2–5.

CONSTABLE. See COSTS, 5.

CONSTITUTIONAL LAW. See CRIMINAL LAW, 1. ROCK COUNTY MUNICIPAL COURT. TAX TITLES, 7.

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CONTRACTS.

See ACCORD. AGENCY. BILLS AND NOTES. CHATTEL MORTGAGES. CORPORATIONS. COSTS, 4. COURT AND JURY, 1. DAMAGES, 3, 4. DEBTOR AND CREDITOR. DEED. EVIDENCE, 13. FRAUDULENT CONVEYANCES. INSTRUCTIONS TO JURY. INSURANCE. INTEREST, 1. JOINDER. JUDGMENT, 3, 4. LANDLORD AND TENANT. LIENS. LIMITATION OF ACTIONS, 1, 3–5. MARRIED WOMEN. MORTGAGES, 1–4. OFFICERS. PARENT AND CHILD. PARTNERSHIP. PATENTS. PLEADING, 5, 7. SALE OF CHATTELS. SURETYSHIP. VENDOR AND PURCHASER.

1. An oral agreement by the grantee of land, in consideration of the conveyance, to furnish a home to the grantor and to care for and support him during his life, is a *personal* agreement. *Divan v. Loomis,* 150

2. An agreement that A. shall procure the conveyance to B. of lands belonging to a third person, upon which A. has discovered a valuable quarry, that B. shall pay for such land, and that thereafter they shall open and work the quarry together and share the profits equally, is either an agreement for a copartnership or an agreement of copartnership, and for a breach thereof by B., A. may maintain an action for damages. *Treat v. Hiles,* 344

3. Such a contract is not within the statute of frauds (sec. 2302, R. S.), as being for any interest in lands, nor (sec. 2307) as being by its terms not to be performed within one year. *Ibid.*

4. Plaintiff sold machinery for the defendants on commission, but such machinery, not being paid for, had to be taken back. In an action for the commission on the sale, defendants claimed that the contract as to compensation was conditional, and that where the machinery had to be taken back no commission was to be paid. A usage to that effect was proven, but the evidence as to whether the contract was conditional or not was conflicting. The instructions (stated in the opinion) are *held* to have fairly submitted that question to the jury, and not to have been misleading. *Chase v. Gault,* 412

5. An agreement, made upon the sale of a stock of goods, good-will, etc., that the vendor will not engage in the same business in that village for a period of five years, is valid, being only a partial or limited restraint upon trade. *Washburn v. Dosch,* 436

6. A contract fully executed by one party at the time of the making thereof, is not within the statute of frauds, although by its terms it is not to be performed by the other party within one year. *Ibid.*

7. An oral promise by an employer to a creditor of his employee to pay the debt at the end of sixty days if the employee continued to work for him during that time,—the contract of employment being for a longer time than sixty days, and the creditor not releasing his claim against the employee or extending the time for its payment,—is within the statute of frauds and void. *Willard v. Bosshard,* 454

CONTRIBUTION. See SURETYSHIP.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 1, 8. PLEADING, 6. RAILROADS (B.), 4.

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CONVERSION.

See CHATTEL MORTGAGES, 2. INTEREST, 2. PLEADING, 7.

1. The attachment by an officer of chattels not belonging to the attachment debtor, and his marking them, and thus assuming and retaining control over them, and subsequently asserting and justifying his seizure and possession under the attachment, is a conversion thereof. *Brickley v. Walker*, 563

2. A complaint which alleges the plaintiff's ownership of chattels, their value, the unlawful conversion and disposition of the same by defendant to his own use, to plaintiff's damage, will be held good after a trial in which the title was put in issue and fully tried and a verdict rendered for plaintiff, notwithstanding it fails to allege the plaintiff's possession or immediate right of possession. *Ibid.*

CONVEYANCE. See ADVERSE POSSESSION. CONTRACTS, 1–3. CORPORATIONS. DAMAGES, 3, 4. DEBTOR AND CREDITOR, 3, 9–11. DEED. MORTGAGES, 1–3. TAX TITLES, 6–8. VENDOR AND PURCHASER.

CORD-WOOD. See LIENS, 2.

CORPORATIONS.

See DEBTOR AND CREDITOR, 9–11. INSURANCE. MUNICIPAL CORPORATIONS. RAILROADS. VENDOR AND PURCHASER, 4.

A deed of land by a corporation, to be valid, must, under sec. 2216, R. S., be signed by its president or other authorized officer, sealed with its seal, and countersigned by its secretary or clerk. *Galloway v. Hamilton*, 651

COSTS.

See APPEAL (B.), 3, 4.

1. A judgment affirming a justice's judgment was set aside, and after a rehearing a new judgment of affirmance was rendered which included costs to the amount of $9.69 in addition to the costs recovered in the previous judgment of affirmance. It did not appear what such excess was for, but no specific objection thereto was made in the circuit court. *Held*, that the judgment would not be disturbed on account of such excess. *Wold v. Ordway*, 176

2. An error in the taxation of costs, by the allowance of too large a sum, is cured by a remission of the excess before the appeal is taken. *Duffy v. Hickey*, 380

3. Where costs have been taxed on a former trial the amount thereof may be allowed as a single item upon a final taxation in favor of the same party. *Ibid.*

4. Under subd. 6, sec. 2918, R. S., as amended by ch. 52, Laws of 1881, if the plaintiff in an action on contract brought in the circuit court recovers more than $100, he is entitled to costs, even though the action was within the jurisdiction of a justice of the peace. *Chase v. Gault*, 412

5. The return of a constable upon a subpœna issued out of the circuit court is presumptive evidence that it was served as therein stated, and that the charges therein are proper. *Leary v. Leary*, 662

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6. The affidavit of the attendance of witnesses stated that they had traveled a certain number of miles. The court, in taxing the costs on appeal from the clerk, allowed for twice that number of miles. On appeal, there being no pretense that witnesses did not in fact travel the number of miles allowed for, this court declines to reverse the judgment. *Ibid.*

COUNTERCLAIM. See LANDLORD AND TENANT, 2. PLEADING, 3. SALE OF CHATTELS, 5.

COURT AND JURY.

See APPEAL (B.), 7, 10, 16. ASSAULT AND BATTERY, 3. INSTRUCTIONS TO JURY. MUNICIPAL CORPORATIONS, 4. RAILROADS (B.), 4; (C.), 1.

1. In an action for the contract price for putting on a tin roof (which was blown off shortly after it was put on), it is *held* that the evidence conclusively shows that the roof was not properly put on and fastened, and that it was error to submit that question to the jury. *Muth v. Frost*, 425
2. A nonsuit is improper, where the evidence, though contradictory, will sustain a verdict for the plaintiff. *Marshall v. Holmes*, 555

COURT COMMISSIONER. See VOLUNTARY ASSIGNMENT, 8.

COVENANTS. See DAMAGES, 3, 4. DEED. LANDLORD AND TENANT, 3–5.

CRIMINAL LAW AND PRACTICE.

1. Where a person liable to be charged criminally, by fraud procures himself to be convicted of the offense, such conviction is no bar to another prosecution, except, perhaps, where the full penalty of the law has been imposed and suffered. *McFarland v. State*, 400
2. A defendant pleaded not guilty, also a former conviction. A trial of the issue formed on the latter plea resulted in a verdict that the former conviction was procured by fraud and collusion and was no bar to the prosecution. *Held*, that a conviction could not follow from such verdict, without a trial upon the issue made by the plea of not guilty. *Ibid.*
3. An information charging the breaking and entering of a freight car, but not stating whether it was in the day time or night time, is *held* sufficient under sec. 4410, R. S., as charging a breaking and entering in the day time. *Nicholls v. State*, 416
4. Defendant secreted himself in a box which he procured to be placed by the agents of an express company in an express car. His intention was to rob the car. *Held*, that this was a constructive breaking. *Ibid.*
5. Sec. 4411, R. S., does not supersede the common-law doctrine of constructive breaking, but merely enlarges its scope in some respects. *Ibid.*
6. An information charging the breaking and entering of a "freight and express car of the American Express Company," sufficiently charges the offense to have been committed in a "railroad freight car," within the meaning of sec. 4410, R. S. *Ibid.*
7. Under such an information, proof of the exclusive possession, occupancy and control of the car by the express company, is sufficient proof of ownership. *Ibid.*

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8. In the argument of a criminal case the district attorney animadverted to the jury upon the fact that the prisoner had not been sworn. Objection was made, and the trial court ruled: "It is probably competent to show that the offense had not been denied." The undisputed evidence included the prisoner's voluntary admissions of guilt. The record does not show the language used by the district attorney, or the occasion for it. *Held*, that it must be presumed that something occurred or was said which rendered the remark proper. *Ibid.*

9. An error in permitting the district attorney, in opening the case to the jury, to state that the defendant committed a crime in Germany and fled from justice, and after landing in this country committed another crime, etc., is *held* to render a new trial necessary, although the trial judge, in ruling that such statement could be made, suggested that the fact that the accused had committed one crime was no evidence that he committed the crime for which he was being tried, and afterwards instructed the jury not to regard such statement and that it was not in the case. *Sasse v. State*, 530

10. When the first witness for the prosecution was called he did not respond, and the district attorney said, "Perhaps somebody has got hold of him." Being reproved by the trial court, he said "I will prove it before I get through." *Held*, improper. *Ibid.*

11. If counsel are allowed to accompany the jury upon a view of a place where a crime is alleged to have been committed, they should not be allowed, while there, to discuss the localities or call the attention of the jury to the facts. *Ibid.*

12. *Quære*, whether a view may be taken in the absence of a defendant who has not expressly waived his right to be present. *Ibid.*

13. The object of a view is merely to assist the jurors in weighing and applying the evidence. The knowledge derived from the view itself is no part of the evidence. *Ibid.*

CROSS-EXAMINATION. See EVIDENCE, 16.

CUSTOM. See AGENCY, 2. CONTRACTS, 4.

DAMAGES.

See ASSAULT AND BATTERY, 2. DEED, 1. EVIDENCE, 3, 4. INSTRUCTIONS TO JURY, 2. INSURANCE, 3. JUDGMENT, 3, 4. LANDLORD AND TENANT, 3-6. LOGS AND TIMBER. PLEADING, 3. RAILROADS (A.). SALE OF CHATTELS, 5.

1. In an action for personal injuries, reasonable expenses for medical attendance are a proper element of damages. *Hulehan v. G. B., W. & St. P. R. Co.* 520

2. Where an instruction states the different matters to be considered in estimating damages, an exception should be to the specific matter claimed to be improper and not to the whole instruction. *Ibid.*

3. Where the title fails to only a part of the land conveyed, the grantee may recover in an action on the covenants of seizin and right to convey, or upon an agreement to convey, such a fractional part of the whole consideration paid as the value, at the time of the purchase, of the piece to which the title fails bears to the value of the whole piece purchased, and interest thereon during the time he has been deprived of the use of such fractional part, but not exceeding

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six years. A clerical error in the attempted statement of the rule in *Messer v. Oestreich*, 52 Wis. 694 (inadvertently repeated in *Bartelt v. Braunsdorf*, 57 id. 3, and *Docter v. Hellberg*, 65 id. 424), corrected. *Semple v. Whorton*, 626

4. Such values may be shown by parol evidence, and are to be determined from the actual and visible conditions of the several parts at the time of the purchase, and not from the conditions then supposed to exist or contemplated by the parties. *Ibid.*

TAYLOR, J., dissenting, is of the opinion that the rule of damages above stated is merely a general rule for determining, in ordinary cases, the amount paid for the part to which title fails, and that it should not be applied in a case where it turns out that such part is of more value than any of the other parts of the tract purchased, not on account of anything in the contemplation of the parties, but by reason of facts which neither of them knew at the time and which the purchaser did not take into consideration when purchasing or in fixing the price which he was willing to pay. *Ibid.*

5. A verdict awarding $966.66 to a laboring woman whole leg was broken and permanently injured by reason of a defective sidewalk, *held* not excessive. *Schroth v. Prescott*, 678

DEATH caused by negligence. See EVIDENCE, 2, 4. PLEADING, 1.

DEBTOR AND CREDITOR.

See ACCORD. AGENCY. BANKRUPTCY. CHATTEL MORTGAGES. CONTRACTS, 7. ESTATES OF DECEDENTS. EVIDENCE, 18. FRAUDULENT CONVEYANCES. GARNISHMENT. HOMESTEAD. INTEREST, 1. JUDGMENT, 3, 4. LIENS. LIMITATION OF ACTIONS, 3-5. MARRIED WOMEN. MORTGAGES. PARTNERSHIP. PAYMENT, 1. RECEIVERS. SURETYSHIP. VOLUNTARY ASSIGNMENT.

1. To entitle one creditor to reach, by petition in the nature of a creditors' bill in equity, money in the hands of the court apparently belonging to another creditor of the common debtor, the petitioner must show that he has exhausted his remedy at law against the debtor, or that he has a specific lien upon the money by virtue of an attachment or execution levied upon the same or upon the property from the sale of which the fund arose. *Meissner v. Meissner*, 336

2. An allegation in such petition that the petitioner was induced not to intervene with other creditors in a former proceeding against the same fund, by a promise of the creditor to whom such fund apparently belonged that if the intervening creditors should succeed the balance of the fund after paying them should be applied upon the petitioner's judgment, shows a waiver of the petitioner's right to intervene, and is a sufficient ground for dismissing the petition. *Ibid.*

3. Deeds and contracts for land, running to a married woman, are *prima facie* evidence of her title to the land and to the timber cut therefrom, as against her husband's creditors. *Brickley v. Walker*, 563

4. Policies of insurance upon lumber in the names of a wife and daughter are admissible in evidence, in an action by them for the conversion of such lumber by attaching creditors of the husband and father, as tending to show that they treated the property as their own. *Ibid.*

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5. Evidence to show the sources from which the wife and daughter acquired money, with which to buy land or timber from which such lumber was made, is admissible in such action. *Ibid.*

6. Evidence is not admissible in such action to show that accounts relating to contracts with the plaintiffs were kept by the other contracting parties in the name of the husband and father, unless the plaintiffs' knowledge of or acquiescence in their being so kept is also shown. *Ibid.*

7. Where a wife claims title to property seized on execution against her husband, even though by conveyance from him to her, the burden of proof is upon her merely to show that she purchased for a valuable and adequate consideration paid out of her separate estate, or by some other person for her; and the burden of proving the conveyance to have been in fraud of the husband's creditors is upon such creditors. *Ibid.*

8. The fact that a husband is insolvent does not preclude him from paying to his wife a valid debt, due from him to her for money loaned, thus preferring her to other creditors. *Ibid.*

9. A subsequent ratification of a deed of corporate land executed only by the president, cannot affect the lien of an intervening judgment creditor of the corporation. *Galloway v. Hamilton.* 651

10. A deed of corporate land, executed without authority by the president of the corporation, on the eve of its insolvency, not followed by a change of possession before the levy of an execution by a creditor, will not confer an equitable title as against such creditor, though there had been previous negotiations about the purchase and the purchase money was paid. *Ibid.*

11. Where a judgment has become a specific lien upon land actually belonging to the judgment debtor, by the levy of an execution thereon, equity will entertain an action by the judgment creditor in aid of his execution, without a previous return thereof, to remove an obstruction, such as a fraudulent conveyance of the land, which will prevent a sale at full value. *Ibid.*

DECLARATIONS. See MORTGAGES, 3.

DEED.

See ADVERSE POSSESSION. CORPORATIONS. DAMAGES, 3, 4. DEBTOR AND CREDITOR, 3, 9–11. MORTGAGES, 1–4. TAX TITLES, 6–8. VENDOR AND PURCHASER, 2–4, 8.

1. Land conveyed by warranty deed had been sold for taxes, but the right of redemption remained. *Held*, that there was no breach of the covenant of seizin, but at most an outstanding incumbrance, upon paying which the grantee might recover on the covenant against incumbrances. *Semple v. Whorton,* 626

2. A wife who joins with her husband in the execution of a deed, merely for the purpose of barring her dower, is not personally liable on the covenants in the deed. *Ibid.*

DEFAULT. See JUDGMENT, 1, 4.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See LIMITATION OF ACTIONS, 6.

DELIVERY. See SALE OF CHATTELS, 6.

DEMAND. See LIMITATION OF ACTIONS, 1. PLEADING, 2.

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DEMURRER. See PLEADING, 4.

DESCRIPTION. See CHATTEL MORTGAGES, 1. TAX TITLES, 6, 7.

DISCRETION. See ESTATES OF DECEDENTS. EVIDENCE, 8, 19. JUDGMENT, 2, 7. NEW TRIAL, 2, 4. RECEIVERS, 1.

DISTRICT ATTORNEY. See CRIMINAL LAW, 8–10.

DITCHES AND DRAINS. See HIGHWAYS, 3, 4.

DIVORCE.

Every provision made in a judgment of divorce for the support of the wife, unless it is expressly declared to be a division and partition of the estate of the husband, will be construed as alimony, and the court may afterwards, under changed circumstances, modify such judgment as may be just. *Blake v. Blake*, 303

DOMICILE. See VOLUNTARY ASSIGNMENT, 6.

DOWER. See DEED, 2.

EJECTMENT. See ADVERSE POSSESSION.

EMINENT DOMAIN. See HIGHWAYS, 2–4. RAILROADS (A.).

EQUITY. See BANKRUPTCY, 4. DEBTOR AND CREDITOR, 1, 2, 10, 11. FRAUDULENT CONVEYANCES. HIGHWAYS, 5. JUDGMENT, 6. LIENS. MORTGAGES. NAVIGABLE RIVERS. PATENTS, 3. PAYMENT, 1. RECEIVERS. SURETYSHIP. VENDOR AND PURCHASER, 5, 6.

ESTATES OF DECEDENTS.

See AGENCY, 1. HIGHWAYS, 1. LIMITATION OF ACTIONS, 2. WILLS.

A claim against a decedent based upon a foreign judgment was disallowed on the ground that such judgment was void for want of jurisdiction. *Held*, that upon application made thereafter in due time the county court should have extended the time for presenting claims, so as to allow a claim to be presented based upon the original demand upon which such judgment was founded. *Smith v. Grady*. 215

ESTOPPEL. See HOMESTEADS, 1. INSURANCE, 1, 7.

EVIDENCE.

See AGENCY, 1. APPEAL (B.). 1, 5, 7, 10, 13, 14, 16. ASSAULT AND BATTERY, 2–4. COSTS, 5. COURT AND JURY. CRIMINAL LAW, 8–13. DAMAGES, 1, 4. DEBTOR AND CREDITOR, 3–7. FRAUDULENT CONVEYANCES. LANDLORD AND TENANT, 1, 2. MORTGAGES, 3, 5, 7. NEGLIGENCE, 1. NEW TRIAL, 1, 3, 4. RAILROADS (A.), 1, 2; (B.), 4; (C.), 1, REPLEVIN. SALE OF CHATTELS, 4. TAX TITLES, 1, 2, 5. VENDOR AND PURCHASER, 2, 7. WILLS.

1. A witness may properly testify that entries made by him in a book of account are correct, although he has no independent recollection of the transactions thus entered. *Curran v. Witter*, 16

2. Where the death of plaintiff's intestate is alleged to have resulted from injuries caused by defendant's negligence, testimony as to the expressions of pain uttered by the deceased at the time she claimed to be injured, and from that time to her death, and indicating where such pains were located, is admissible. *McKeigue v. Janesville*, 50

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3. Evidence that some of the younger children of plaintiff's intestate were in poor health is competent as tending to show that her death was a pecuniary loss to them especially. So, also, evidence tending to show that the children had no means of support of their own is admissible. *Ibid.*

4. In an action to recover damages for the death of a person, annuity tables are admissible in evidence as tending to show the number of years the deceased would probably have lived. *Ibid.*

5. In a foreclosure action the plaintiffs claimed as assignees of the note and mortgage. There was no written assignment, and the mortgagee was dead. The defendants claimed that the note and mortgage had belonged to the wife of the mortgagee and had been paid to her by them. *Held:*

(1) Statements of the mortgagee, made before his death to a third person, tending to show that he had sold the note and mortgage to the plaintiff's assignor, were admissible.

(2) Evidence as to what the mortgagee said when the note and mortgage were given, offered to show that they belonged to his wife, was not admissible to defeat the plaintiff's title derived from such mortgagee. *Lehman v. Sherger,* 145

6. A witness was allowed to testify to his opinion of the value of a stock of goods, after he had stated that he made no particular examination of them. He was fully cross-examined and gave the reasons for his opinion. The goods had never been invoiced, and none of the other witnesses on either side knew much, if anything, more about the goods. *Held,* that the testimony could not have misled the jury or prejudiced the appellants. *Baum v. Bosworth,* 196

7. The question being whether the ice-box for the price of which the action was brought was properly constructed to fulfil its purposes, and the plaintiff having testified that, as on all other ice-boxes, his work was done in a good, substantial, and workmanlike manner, but there being no evidence of any other similarity in the boxes, it was not competent for the defendant to ask if the plaintiff ever got or asked for his pay for one of the other boxes, or to show how one of the other boxes "turned out." *Morawetz v. McGovern,* 312

8. The admission of evidence in reply, which should have been given in opening the case, is a matter in the discretion of the trial court, and if the opposite party has not been injured by its admission out of its proper order the judgment will not be reversed therefor. *Duffy v. Hickey,* 380

9. The admission of improper evidence by a referee is not ground for a reversal if there was sufficient evidence properly admitted to sustain the findings. *Ibid.*

10. Evidence admitted for a specific purpose only cannot be used for any other purpose in the case. *Cayon v. Dwelling House Ins. Co.* 510

11. This court cannot say that it was error to exclude a witness offered in rebuttal, unless the appellant told the trial court what facts he wished to prove by such witness. *Plano Mfg. Co. v. Frawley,* 577

12. The remarks made to the jury by defendant's attorney, in commenting upon the testimony of a witness in this case, *held* not sufficient cause for reversing the judgment. *Ibid.*

13. In an action to charge two persons as partners upon a note executed by one of them in a firm name, parol evidence is admissible to

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show that, at the time of their executing a contract with the plaintiff, on which such note was based, it was understood between the parties that no partnership was formed; but not to show that one of them was not to be bound for the performance of the contract. *Ibid.*

14. An admission made by a party to an attorney, relative to his liability on a note which he knew such attorney had in charge for collection, is not privileged, so as to be inadmissible against him in an action thereon, by reason of such party's having employed the same attorney in a matter entirely disconnected therewith, such as the collection of claims in his own favor. *Ibid.*

15. In an action against F. and S. as partners, F. denied the partnership. S. had delivered a package of claims purporting to belong to F. & S. to an attorney, saying that directions would be found in the package. At the same time, and before the package was opened, the attorney received a telegram from F.: "Have you got F. & S. amounts to collect?" *Held*, that such telegram was not privileged as being a confidential communication between a client and his attorney. *Ibid.*

16. If part of a conversation between a witness and a defendant is introduced in evidence by the plaintiff, the defendant may properly be permitted to testify as to the whole of such conversation, including what he himself said; but he cannot do so if the conversation was first drawn out of plaintiff's witness by him on cross-examination. *Ibid.*

17. Proof, by the scale and otherwise, of the whole quantity of logs which had been stored in a mill pond, together with evidence of the quantity of lumber sawed from what remained after the defendant had converted a portion of them, is admissible to show the quantity converted, although it is conceded that the saw-bill generally differs from the scale. *Walker v. Duncan*, 624

18. Parol evidence is admissible to show whether a receipted bill for the amounts of judgments and costs in certain actions specified, given on settlement of a creditors' suit pending thereon, was understood and intended by the parties at the time to evidence a settlement of an appeal in one of those actions. *Chapman v. Sutton*, 657

19. The court before which an action has been tried without a jury may properly, even after the case has been submitted and its decision has been announced, open the case for further evidence, if it appears that new and material evidence has been discovered by the defeated party since the submission; and this it may do without imposing terms. *Leary v. Leary*, 662

EXCEPTIONS. See APPEAL (B.), 1, 5, 6, 11, 12.

EXCISE LAWS.

See CENSUS.

1. For the purpose of ascertaining the amount to be paid for licenses to sell intoxicating liquors in towns, under sec. 1, ch. 296, Laws of 1885, the question whether there is a city or village containing more than 500 inhabitants within the boundaries of any town can be determined only in the way prescribed by that act, viz., "by the last preceding enumeration by the state or general government." *State ex rel. Terry v. Keaough*, 135

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2. Under sec. 4, ch. 296, Laws of 1885, a brewer cannot establish an agency for the sale of his beer in a town away from his place of business, and sell to such persons as desire to purchase, without obtaining a license from the authorities of the town where the sale is made. *Scanlan v. Childs*, 33 Wis. 663, distinguished. CASSODAY and ORTON, JJ., dissent. *Peitz v. State*, 538

EXECUTION. See DEBTOR AND CREDITOR, 1, 11. HOMESTEAD. REPLEVIN, 1. SURETYSHIP, 2.

EXECUTORS AND ADMINISTRATORS. See HIGHWAYS, 1. LIMITATION OF ACTIONS, 2. WILLS.

EXEMPTIONS. See HOMESTEAD. VOLUNTARY ASSIGNMENT, 3.

FELLOW-SERVANTS. See RAILROADS (B.), 2.

FENCES.

1. Notice of the meeting of the fence viewers to examine a fence and ascertain the expense thereof, under sec. 1397, R. S., must be served upon the owner or occupant of the land in the same way that the notice required by sec. 1393 must be served, i. e. as a summons is served in a civil action before a justice of the peace. If not so served the proceedings of the fence viewers are without jurisdiction. *Voelz v. Breitenfield*, 491

2. Under sec. 1397, R. S., requiring the certificate of the fence viewers to state the "amount of the *expense* of such building," etc., a certificate stating only that the "*value* of such rebuilding is $33," is void. *Ibid.*

3. Sec. 1397, R. S., is a highly penal statute, and its provisions must be strictly complied with. *Ibid.*

FINDINGS OF FACT: EXCEPTIONS. See APPEAL (B.), 1.

FORCIBLE ENTRY, ETC. See ROCK COUNTY MUNICIPAL COURT, 2.

FORECLOSURE. See EVIDENCE, 5. MORTGAGES, 4–7.

FOREIGN JUDGMENT. See JURISDICTION.

FORFEITURE. See INSURANCE, 1–3.

FRAUD. See ACCORD AND SATISFACTION. CRIMINAL LAW, 1, 2. DEBTOR AND CREDITOR, 3–8, 11. FRAUDULENT CONVEYANCES. INSURANCE, 3, 4. VENDOR AND PURCHASER, 6. VOLUNTARY ASSIGNMENT, 1, 4–6.

FRAUDS, STATUTE OF. See CONTRACTS, 3, 6, 7. SALE OF CHATTELS, 6, 7. VENDOR AND PURCHASER, 3, 6–8.

FRAUDULENT CONVEYANCES.

See DEBTOR AND CREDITOR, 3–8, 11. VOLUNTARY ASSIGNMENT, 1.

The evidence in this case shows, among other things, that a wholesale mercantile firm, to secure a debt due from an insolvent retail dealer, took a mortgage of his entire stock in trade and fixtures (being everything he had not exempt from execution) worth nearly three times the amount of the debt; that nominally the mortgagees took possession and placed the debtor's brother in charge of the goods, but in fact the debtor attended to the business much as before, making sales as usual and taking goods from the stock for his

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own consumption, the mortgagees furnishing more goods to keep up the stock; that the mortgagees never asked or received an accounting of the goods sold from the mortgaged stock; that after about three months, the other creditors becoming pressing, the mortgagees had the property sold at auction on one day's notice, bidding it in themselves, and again placed the debtor in charge of the business; that the goods mortgaged were never inventoried; that since the auction sale a large part of the debt to the mortgagees has been paid, but there has never been a full settlement showing what goods have been sold or what the balance due is. *Held*, that the mortgage was void, as having been given with intent to hinder and delay other creditors. *Baum v. Bosworth*, 196

GARNISHMENT.

See LIENS, 2.

1. The service of the garnishee summons upon the principal defendant under sec. 2756, R. S., is not a prerequisite of jurisdiction, but is merely a *notice* in a proceeding *in rem*, jurisdiction of the *res* being acquired by service upon the garnishee. *Winner v. Hoyt*, 278

2. Where the garnishment is in aid of execution upon a judgment against partners, both of whom appeared in the principal action, and where the property sought to be reached had been assigned to the garnishee by the firm, service of the garnishee summons upon one partner is sufficient to prevent the service upon the garnishee from becoming void and of no effect. *Ibid.*

3. Where a garnishee summons has been placed in the hands of the sheriff of the county where the principal defendant resides, and the sheriff is unable, after due diligence, to find such defendant in the county, and ascertains that he has no usual place of abode with any family or person, and is informed that he has left the county to be absent traveling until after the time limited for the service of such summons has expired, and is unable, after due diligence, to ascertain where he could be found at any particular time within the period so limited, so that service could be made on him at that place, such sheriff is justified in returning that after due diligence service could not be made on such defendant within the state. *Ibid.*

4. *Winner v. Hoyt*, followed. *Corning v. Hoyt*, 294. *Emil Kiewert Co. v. Hoyt*, 296

GROWING CROPS. See LANDLORD AND TENANT,

GUARANTY. See OFFICERS. SURETYSHIP.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 2, 4. NAVIGABLE RIVERS. NEGLIGENCE, 1. RAILROADS (C.), 2.

1. If a person injured by reason of the insufficiency or want of repairs of a highway dies within ninety days, the fact that the notice required by sec. 1339, R. S., was not given, does not defeat an action brought by the administrator under sec. 4255, R. S. It is not necessary in any case for the administrator to give such notice. *McKeigue v. Janesville*, 50

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2. Within ten days after the determination of the supervisors to lay out a highway under sec. 1275, R. S., the applicant must pay the amount assessed as advantages and thus secure the filing of the order. If he fails to do so, it will be deemed, under sec. 1269, R. S., that the supervisors have decided against his application. *State ex rel. Giblin v. Sup'rs of Town of Union,* 158

3. The supervisors have no power to appoint appraisers under sec. 1237, R. S., except upon application by the owner or occupant of the land entered upon or used. *State ex rel. Smith v. Sup'rs, etc. of Town of Leon,* 502

4. A claim for damages filed by such owner or occupant with the town clerk in order that it might be laid before the board of audit, cannot be construed as an application for the appointment of appraisers. *Ibid.*

5. An injunction will not be granted, at the suit of tax-payers, to restrain town officers from issuing town or road orders or incurring expense in anticipation of the collection of a tax voted for highway purposes in excess of the amount authorized by law, or from placing such tax upon the tax roll. *Sage v. Fifield,* 546

6. Under sec. 1240, R. S., as amended by ch. 163, Laws of 1883, the electors of a town containing two congressional townships may direct the supervisors to assess as highway taxes any amount not exceeding fifteen mills on the dollar of the valuation of property in the town, provided such amount does not exceed $2,000 and seven mills on the dollar of such valuation. *Ibid.*

7. In such a town it had been decided to collect the highway taxes in money. The valuation of property exceeded $500,000. The electors voted to raise a highway tax of $5,000. *Held,* that if it was necessary thereafter for the supervisors to direct the assessment of so many mills on the dollar as would make such sum of $5,000, they might do so by directing that amount to be apportioned upon the assessment roll. *Ibid.*

HOMESTEAD.

1. The affidavit for an attachment alleged that the defendant was about to dispose of his property with intent to defraud his creditors. The defendant traversed the affidavit, but afterwards stipulated to withdraw the traverse and allow the plaintiff to take judgment for a sum less than his demand. Execution issued on the judgment, and was satisfied by the sale of several parcels of land which had been seized on the attachment. *Held,* that the defendant was not estopped from claiming that one of such parcels was his homestead and exempt from sale. *Phillips v. Root,* 128

2. Where under an execution a homestead is sold with other parcels of land for a gross sum, the entire sale should be set aside; but, upon application, the satisfaction of the execution will be vacated so that an *alias* execution may issue. *Ibid.*

3. Removal from a homestead for a temporary purpose,— as to enable children to attend school,— but with the intention to reoccupy it, does not impair the exemption. *Ibid.*

HUSBAND AND WIFE. See DEBTOR AND CREDITOR, 3-8. DEED, 2. DIVORCE. EVIDENCE, 5. MARRIED WOMEN.

INFORMATION. See CRIMINAL LAW, 3, 6, 7.

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INJUNCTION. See BANKRUPTCY, 4. HIGHWAYS, 5. NAVIGABLE RIVERS.
INSANE persons. See OFFICERS.
INSOLVENCY. See DEBTOR AND CREDITOR, 8, 10.

INSTRUCTIONS TO JURY.

See APPEAL (B.), 8, 9, 11, 12. CONTRACTS, 4. DAMAGES, 2. RAILROADS, (A.), 3. SALE OF CHATTELS, 5.

1. The instructions in this case (stated in the opinion) are *held* to have fairly submitted to the jury the question whether the ice-box for the contract price of which the action was brought was so constructed that with proper use it would answer the purposes of its construction. *Morawetz v. McGovern,* 312
2. An error in an instruction as to the measure of damages becomes immaterial if the jury entirely disallow the claim for such damages. *Ibid.*
3. Where the court has correctly charged the jury upon all the main questions involved, the failure to give additional or more specific instructions, which were not requested by counsel, is not error. So *held*, where the question raised by the pleadings was whether there had been an *express* contract by a mother-in-law to pay her son-in-law, with whom she lived, for her board, and the court had charged the jury that she would not be liable to pay for such board in the absence of an agreement, but had failed to instruct the jury that they should consider all the circumstances for the purpose of determining whether or not an agreement should be *implied* or inferred therefrom. *Austin v. Moe,* 458

INSURANCE AGAINST FIRE.

1. Plaintiff obtained a policy of insurance from the defendant company for $1,000, which provided that if he obtained additional insurance without the consent of the company the policy should become void. At the time of issuing the policy defendant's agent offered to take an additional risk of $1,000, but plaintiff declined the offer. Afterwards plaintiff procured additional insurance in other companies to the amount of $1,800, and told defendant's agent that he had taken additional insurance, but did not state the amount. After a loss had occurred, plaintiff was told by defendant's agent that his policy required proofs of loss, which the plaintiff accordingly made and forwarded to the company. Neither the defendant nor its agent knew until such proofs of loss were received the amount of the additional insurance. *Held:*
   (1) Assuming that the offer of the agent to take an additional risk amounted to a consent to additional insurance to the amount of $1,000, still the obtaining of such insurance in excess of that sum avoided the policy.
   (2) The requiring of proofs of loss, without knowledge of the amount of the additional insurance, did not constitute a waiver of the forfeiture or estop the company to assert the same. *Bonneville v. Western Ass. Co.* 298
2. The assured is bound by a condition in his policy avoiding it in case he obtains additional insurance without consent, although he did not know that his policy contained such condition. *Ibid.*

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3. Under sec. 1943, R. S., providing that the amount of insurance written in the policy on the real property destroyed "shall be taken conclusively to be the true value of the property when insured, and the true amount of loss and measure of damages when destroyed," the fact that the loss was "knowingly and intentionally" stated by the plaintiff to be greater than it actually was, is immaterial and constitutes no defense to an action on the policy. *Cayon v. Dwelling House Ins. Co.* 510

4. That the assured fraudulently concealed the existence of a mortgage on the premises insured is an affirmative defense which should be pleaded. *Ibid.*

5. *It seems* that in this state a mortgagor is the absolute owner of the mortgaged premises, and has an insurable interest therein to the extent of their value, notwithstanding the mortgage. *Ibid.*

6. A notary public is not a "magistrate," within the meaning of a policy of insurance requiring proofs of loss to be accompanied by a "certificate of a magistrate nearest the place of fire." *Ibid.*

7. Proofs of loss, otherwise proper, were accompanied by a certificate signed by a notary public instead of by a magistrate, as required by the policy. *Held*, that the retention of such proofs by the company without objection until the trial of an action on the policy, constituted a waiver of the defect. *Ibid.*

INTEREST.

See APPEAL (C.). JUDGMENT, 4.

1. An unliquidated account becomes liquidated by the presentation of a bill therefor and a promise of payment at a certain time, and after that time the debt bears interest. *Morawetz v. McGovern*, 312

2. Upon recovery by the plaintiff in an action for the conversion of chattels, interest on their value should be allowed from the time they were taken. *Arpin v. Burch*, 619

INTERVENTION. See DEBTOR AND CREDITOR, 1, 2.

INTOXICATING LIQUORS. See EXCISE LAWS.

JEOPARDY. See CRIMINAL LAW, 1.

JOINDER.

(A.) *Of causes of action.*

A judgment for the payment of money only is a *contract* within the meaning of subd. 2, sec. 2647, R. S., authorizing the joinder of several causes of action when they arise out of contract, express or implied. *Childs v. Harris Mfg. Co.* 231

(B.) *Of parties.*

See DEED, 2. LOGS AND TIMBER, 1. RECEIVERS, 2.

JUDGMENT.

Judgment is a contract. See JOINDER.

Jurisdiction — Foreign judgment. See ESTATES OF DECEDENTS. JURISDICTION.

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Default.

1. The circuit court ordered that the answer be stricken out and that the plaintiff have judgment as upon default unless the defendant do certain things within a certain time. The defendant failed to comply with the conditions of the order, but, after the time limited for such compliance, appealed from the order. A stay of proceedings upon the order, *pending the appeal*, was afterwards granted by this court. The order was affirmed. *Held*, that upon the filing of the *remittitur* the plaintiff was entitled, at once and without notice or further order, to judgment as upon default, in pursuance of the original order. *Whereatt v. Ellis*, 61
2. This court having in such matters appellate jurisdiction only will not, on affirming such an order, give further time for the appellant to comply with its conditions, but will leave that matter to the discretion of the court having original jurisdiction. *Ibid.*
3. Under subd. 1, sec. 2891, R. S., judgment may be entered by the clerk for the amount demanded in the complaint, in an action arising on contract for the recovery of money only, although the damages are unliquidated. *Ibid.*
4. Where the plaintiff was entitled to interest on the amount due him from the time of the commencement of the action, he may include such interest in a judgment taken by default, although the damages were unliquidated and the interest was not specifically demanded in the complaint. *Ibid.*

Form.

On appeal from justice's court. See APPEAL (C.).
In divorce. See DIVORCE.
For deficiency, on foreclosure. See MORTGAGES, 6.

Interest. See INTEREST. JUDGMENT, 4.

Correction and Modification. See DIVORCE.

5. After the term at which a judgment was rendered, and even after the expiration of a year after notice thereof, the circuit court may *correct* a mistake in the entry of the judgment, so as to make it conform to the judgment actually pronounced; but it cannot *modify* or amend the judgment to make it conform to what the court ought to have adjudged or intended to adjudge. *Williams v. Hayes*, 248
6. Whether a judgment simply dismissing the complaint in an equitable action is a bar to a future action or proceeding involving the same subject matter, is not determined. But when in the entry of such a judgment it is erroneously made to appear that the complaint was dismissed "upon the merits," the addition of such words is material, and they may be stricken out on motion. *Ibid.*

Assignment and Subrogation. See SURETYSHIP.

Collection. See DEBTOR AND CREDITOR, 11. GARNISHMENT.

Release and Satisfaction. See BANKRUPTCY, 2–4. REPLEVIN, 2. SURETYSHIP, 2.

Vacating.

7. The relieving of a party from a judgment against him, under sec. 2832, R. S., and the terms upon which such relief shall be granted, are within the discretion of the trial court, and this court will not interfere unless there has been a manifest abuse of discretion. *Whereatt v. Ellis*, 61

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Appeal — Reversal.
When appealable. See APPEAL (B.), 4.
Waiver of appeal. See PAYMENT, 2.
Reversal. See APPEAL (B.), 1, 7–10, 13, 14, 16. COSTS, 1, 2, 6. EVIDENCE, 6, 8, 9, 11, 12. INSTRUCTIONS TO JURY, 2, 3. LANDLORD AND TENANT, 2. MORTGAGES, 6, 7. PLEADING, 3, 5. RAILROADS (A.), 3.

Recovery of amount paid on judgment. See PAYMENT, 1.

Res adjudicata — Bar of judgment. See BANKRUPTCY, 1. CRIMINAL LAW, 1, 2. JUDGMENT, 6.

JURISDICTION.

See FENCES, 1. GARNISHMENT. PATENTS, 1. ROCK COUNTY MUNICIPAL COURT.

Jurisdiction of the person of a party cannot be acquired by the service of process outside of the territorial limits of the government where the court sits, even though such party be a subject of such government, and the cause of action arose within its limits, and its laws have authorized such service and a personal judgment founded thereon. *Smith v. Grady,* 215

JUSTICES' COURTS. See APPEAL (B.), 16; (C.). COSTS, 1, 4.

JUSTIFICATION. See ASSAULT AND BATTERY, 1. CONVERSION, 1.

LACHES. See BANKRUPTCY, 1. LIMITATION OF ACTIONS, 6.

LAND CONTRACT. See DAMAGES, 3, 4. DEBTOR AND CREDITOR, 3. VENDOR AND PURCHASER, 6–8.

LANDLORD AND TENANT.

1. The fact that notice of the application for a tax deed was served upon the person in possession of land is strong evidence that he was not in possession as a tenant of the holder of the tax certificate, as in that case no notice would be necessary. *Lamoreux v. Huntley,* 24

2. In an action for rent the defendant counterclaimed for damage to his goods caused by leakage through the ceiling. It did not appear that the tenant occupying the room above, through the floor of which the water passed, was responsible for the damage. The court admitted evidence under the counterclaim, but in the charge to the jury the counterclaim was not mentioned, and if the jury considered it at all (which is very doubtful), the amount allowed on it must have been very small. *Held,* that the admission of the evidence was not ground for a reversal of the judgment. *Colclough v. Niland,* 309

3. One who executes a lease of a store, knowing that he cannot put the lessee in possession because another is in possession under a valid prior lease executed by himself and not yet expired, is liable to the second lessee for the whole loss proximately sustained by reason of the failure to put him in possession. But the latter should use all reasonable diligence to procure another suitable place in which to carry on his business. *Poposkey v. Munkwitz,* 333

4. In such a case, where the second lessee has advanced rent, and incurred expense in removing goods to such store, with the lessor's consent, and in taking them away again on his failure to obtain possession, he is entitled to recover, in an action for a breach of the

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covenant for quiet enjoyment, the amount of rent so advanced, with interest, and the expenses so incurred; and in addition thereto, if the lessor did not know the purposes for which the premises were hired, the difference between the rent reserved and the actual rental value of the premises; but, if the lessor did know for what they were hired, then the difference between the rent reserved and the rent which he would be compelled to pay for another store equally well adapted to his business, and the additional expense, if any, of removing his goods thereto; or, in case he could not procure another suitable store for his business, then all the damages proximately resulting to his business from the breach of covenant, the value of the lease being a part thereof. *Ibid.*

5. In an action for the breach of a covenant for quiet enjoyment in a written lease, where it appears that the lessor knew at the time of its execution that he could not give possession because of the existence of a prior valid and unexpired lease to another lessee, parol evidence is admissible on the part of plaintiff to show that he was unable after reasonable diligence to procure another store suitable to his business, and, that being *prima facie* established, to show the value of his business, and the special damage thereto by loss of anticipated profits. *Ibid.*

6. The giving of a lease of premises to take effect while they are in the actual possession of a prior lessee under a valid unexpired lease, does not necessarily operate as an assignment of the rent accruing under such prior lease, so as to preclude the second lessee from recovering from the lessor the rent advanced by him. *Ibid.*

7. If there was no reservation in the lease, the lessee of a farm is entitled to a crop of wheat growing upon it at the time of executing the lease, and which matured during the term. *Emery v. Fugina*, 505

LANDS SOLD FOR TAXES. See TAX TITLES.

LEASE. See LANDLORD AND TENANT, 3–7.

LEVY of tax warrant. See TAXATION, 2.

LICENSE LAWS. See EXCISE LAWS.

LICENSE to use patented device. See PATENTS, 2, 8.

LIENS.

See DEBTOR AND CREDITOR, 1, 11.

1. A lien for the amount due for labor performed in manufacturing logs into lumber cannot be enforced as against a *bona fide* purchaser of the lumber for value, who purchased before the filing of the claim for such lien and without notice, either actual or constructive, of the lien. TAYLOR, J., dissents. *Smith v. Shell Lake Lumber Co.* 89

2. An action to enforce a laborer's lien on cord-wood, under ch. 143, R. S., as amended, is legal in its nature, and garnishment may be resorted to in aid thereof. *O'Reilly v. M. & N. R. Co.* 212

LIMITATION OF ACTIONS.

See ADVERSE POSSESSION. TAX TITLES, 3, 4.

1. The statute of limitations begins to run against a certificate of deposit issued by a banker, from the date of its issuance, although no demand of payment is made. *Curran v. Witter*, 16

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2. Sec. 4234, R. S., providing that "if a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representative after the expiration of that time, and within one year from his death," applies only where the person entitled to bring the action dies during the last year of the term of limitation. *Ibid.*

3. A debt which has become barred by the statute of limitations is yet a good consideration for a payment or a promise to pay it. *Marshall v. Holmes,* 555

4. Where a debtor, on being asked to pay an account, voluntarily delivers money to the creditor, without questioning his indebtedness or liability, and promises to pay more in the future, and accepts and retains a receipt for the amount as paid on account, that constitutes a completed payment; and the debtor cannot, at a subsequent time, add qualifications or conditions to such payment, so as to avoid its effect under the statute of limitations. *Ibid.*

5. An unconditional, unqualified, and unequivocal part payment of a debt, voluntarily made by the debtor or by any person legally liable to pay it, after such debt has become barred by the statute of limitations, is sufficient evidence of a new or continuing contract to revive and take such debt out of the statute; and such a payment by one joint debtor has that effect as against him. *Ibid.*

6. A delay for more than six years in bringing a suit for the conversion of logs does not operate as a bar if the defendant was in the meantime a nonresident of the state. *Arpin v. Burch,* 619

LIS PENDENS. See MORTGAGES, 7.

LOGS AND TIMBER.

See ABATEMENT, 2. EVIDENCE, 17. LIENS. REPLEVIN, 2. SALE OF CHATTELS, 2, 3.

1. The holder of school-land certificates sold the timber on the lands to M. Bros., and they contracted with S. for cutting the timber on shares. After the timber had been cut the lands became forfeited to the state for nonpayment of taxes and interest, and were resold to the plaintiff, who, after obtaining a patent, brought an action against M. Bros. and S. for the value of the timber cut. The defendants answered that they had purchased the timber in good faith from the holder of the school-land certificate, and had cut and removed the same in good faith, believing that they had the right to do so. *Held:*

   (1) There being no affidavit that the cutting was done by mistake (sec. 4269, R. S.), and the defendants not having "in good faith acquired a title to and entered upon the land under the same, believing such title to be valid" (ch. 239, Laws of 1882), the plaintiff was entitled to recover the highest market value of the logs or the lumber made from them, under sec. 4269, R. S.

   (2) The action was maintainable against all the defendants jointly. *Smith v. Morgan,* 358

2. One who acquired title to land with knowledge of facts which rendered such title invalid, or who learned such facts before cutting the timber, is not protected by sec. 4269, R. S., as amended by ch. 239, Laws of 1882, but is liable for the highest market value of the timber cut by him, even though he believed that such facts

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did not in law invalidate his title. But mere notice that another person claims to own the land is not inconsistent with good faith in cutting the timber. *Warren v. Putnam*, 481

8. If, after discovering that by mistake he has cut logs upon the land of another, a party mingles such logs with his own and floats them down the river, the owner may retake his logs, or such a quantity out of the mass as will replace his loss, in whatever place or condition they may be at the time of such retaking; and where such owner has peaceably retaken his logs he is not liable to pay to the trespasser the difference between the value of the stumpage and the value of the logs at the time of such retaking. *Arpin v. Burch*, 619

MARRIAGE. See DIVORCE.

MARRIED WOMEN.

See DEBTOR AND CREDITOR, 3–8. DEED, 2. DIVORCE. EVIDENCE, 5.

1. A wife may lawfully contract with a firm of which her husband is a member, to run a boarding house for them for a stipulated share of the profits, and the share so earned by her will be her separate estate. *Brickley v. Walker*, 563

2. A wife may lawfully purchase land and cut and dispose of the timber thereon in her own name, using her husband as her agent, and the proceeds will not be subject to the claims of her husband's creditors, provided she so purchases with money belonging to herself and not belonging to or derived from her husband. *Ibid.*

MASTER AND SERVANT. See LIENS. RAILROADS (B.). VERDICT, 1. VOLTARY ASSIGNMENT, 2.

MAXIMS.
Allegans contraria non est audiendus, 602.
Expressio unius est exclusio alterius, 142.
Omnis ratihabitio retrotrahitur et mandato priori æquiparatur, 40.

MERGER. See BANKRUPTCY, 3.

MISTAKE. See JUDGMENT, 5, 6.

MORTGAGES.

See CHATTEL MORTGAGES. EVIDENCE, 5. INSURANCE, 5.

1. A. purchased land, taking title to a part thereof in his son's name. B. obtained a tax title to that part which was in the name of A., and afterward quitclaimed to C., who quitclaimed to D. A.'s son also quitclaimed to D. The evidence is *held* to warrant a verdict to the effect that D. took and held the title merely as security for advances made to A. or for his benefit. *Lamoreux v. Huntley*, 24

2. While so holding title to the land D. quitclaimed to E. and afterwards, with the knowledge of E., had a settlement with A. and conveyed the land to F. for the benefit of A. It did not appear that there was any consideration for the quitclaim deed to E., and that deed was not recorded until long after the conveyance to F. A. remained in the actual possession of the land all the time. In an action brought by the successor to E.'s title against the heirs of A. it is *held* that E. was not a *bona fide* purchaser, and that he and his grantees were bound by the transactions between D. and A. *Ibid.*

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3. In such action the declarations of A., made while he was in possession, as to his ownership and the nature of his possession, and the declarations of D., made after he had quitclaimed to E. and after A. had notice of that fact, were admissible in evidence on the part of the defendants. *Ibid.*

4. A mortgagee agreed with the mortgagors (her daughter and son-in-law), in consideration of their contract to support her and her husband in a specified manner during their natural lives, not to collect, receive, or ask for any further interest on the mortgage, *provided* the said mortgagors should perform the said contract. The agreement further stated that, *in case* the said mortgagors should perform their said contract according to the meaning and true spirit thereof during the natural lives of the mortgagee and her husband, she (the mortgagee) declared said mortgage "fully paid and satisfied and by these presents discharged of record." *Held*, that full and complete performance of the contract to support was a *condition precedent* to the satisfaction and discharge of the mortgage. *Stoel v. Flanders*, 256

5. The evidence in this case (stated in the opinion) is held to sustain the findings of the trial court that the note and mortgage in suit had not been paid. *Leary v. Leary*, 662

6. A judgment of foreclosure will not be reversed for irregularity merely because it provides that the plaintiff may have execution for any deficiency after a sale of the mortgaged premises. Such a provision, not stating against whom the execution is to issue, may be construed to mean that the plaintiff may have a judgment for deficiency against the persons liable therefor. *Ibid.*

7. The fact that the bill of exceptions does not contain the proof of the filing of the notice of *lis pendens* in an action to foreclose a mortgage, is not ground for reversing the judgment, especially where the fact of such filing is found by the court and the judgment recites the fact and that there was due proof thereof. *Ibid.*

MUNICIPAL CORPORATIONS.

See EXCISE LAWS. HIGHWAYS. NEGLIGENCE. PAUPERS.

1. Though after the commencement of an action against a city, the plaintiff's attorney becomes mayor of the city, he may still appear for the plaintiff on the trial of the action. *McKeigue v. Janesville*, 50

2. Where by a city charter the common council has "control and power over and management of" all streets, notice to a member of the council of a defect in a street is notice to the city itself. *Ibid.*

3. An action will lie against a city for injuries to a lot caused by a change in the grade of a street otherwise than as authorized by law, and in violation of legal restrictions. *Meinzer v. Racine*, 241

4. The questions in the case, whether the hole in the sidewalk which caused the fall and injury of the plaintiff was such a defect as to render the city liable for such injury, and whether the city had notice of such defect, are *held* to have been properly submitted to the jury. *Schroth v. Prescott*, 678

MUNICIPAL COURTS. See ROCK COUNTY MUNICIPAL COURT.

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NAVIGABLE RIVERS.

Rock river in this state is a public, navigable river, which it is unlawful to obstruct. But it appearing that the navigation of the river at Janesville has long been abandoned, and that the stream there is already so filled with obstructions by dams and bridges that it is not navigable in fact, the erection of a building in the river at that place, which would not materially obstruct or abridge the use of the river for navigation if such use were needed, will not be restrained at the suit of the attorney general. *State v. Carpenter*, 165

NEGLIGENCE.

See PLEADING, 6. RAILROADS (B.), 2-4; (C.).

1. The fact that a person who was injured while passing over a defective cross-walk knew of the defect and that there was some risk in so passing, and might easily have gone around the dangerous place, does not, as matter of law, establish contributory negligence. *McKeigue v. Janesville*, 50
2. The owner of a city lot is not bound to fence or guard an excavation or pond therein not situated so near the street as to make it unsafe for persons passing, and is not liable in damages for the death of a boy who, while playing about such excavation or pond, falls therein and is drowned. *Klix v. Nieman*, 271
3. One who has placed his machinery in a building, with knowledge of the leaky condition of the roof, is guilty of contributory negligence which will prevent a recovery for the damage to such machinery caused by the leakage. *Muth v. Frost*, 425

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWLY discovered evidence. See EVIDENCE, 19. NEW TRIAL, 3.

NEW TRIAL.

See APPEAL (B.), 6, 7, 10, 15. EVIDENCE, 19.

1. The fact that a referee's minutes of the evidence have been changed is not a ground for setting aside his report and directing a new trial. The remedy is by correction of the minutes. *Duffy v. Hickey*, 380
2. The granting of a new trial at the cost of the defeated party is within the discretion of the trial court, and its order will not be reversed unless there was a manifest abuse of such discretion, or unless it affirmatively appears from the record that the order was based upon a misapprehension of law. *Mullen v. Reinig*, 408
3. Newly discovered evidence upon points not involved in the issues of the case, nor capable of being determined on the new trial, is not sufficient ground for granting a new trial, though it may entitle the party to some other relief. *Brickley v. Walker*, 563
4. *It seems* that it would not be an abuse of discretion to refuse to grant a new trial upon the strength of any statement made by a witness who is in his dotage, though contradictory of his testimony at the trial. *Leary v. Leary*, 662

NONSUIT. See COURT AND JURY, 2. RAILROADS (C.), 1.

NOTARY PUBLIC is not a magistrate. See INSURANCE, 6.

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NOTICE.
Of entry of judgment. See APPEAL (B.), 1.
Of appeal — Form. See APPEAL (B.), 2.
Of meeting of fence-viewers — Service. See FENCES, 1.
Of garnishment, to principal defendant. See GARNISHMENT, 1.
Of injury from defect in highway. See HIGHWAYS, 1.
Of condition avoiding policy. See INSURANCE, 2.
Of application for tax deed. See LANDLORD AND TENANT, 1.
Of purpose for which premises are leased. See LANDLORD AND TENANT, 4.
Of lien on logs. See LIENS, 1.
Of claim of title to lands. See LOGS AND TIMBER, 2. MORTGAGES, 2. VENDOR AND PURCHASER, 1.
Of pendency of action. See MORTGAGES, 7.
Of defect in street. See MUNICIPAL CORPORATIONS, 2, 4. NEGLIGENCE, 1.
Of risks of employment. See RAILROADS (B.), 3, 4.
Of tax sale — Proof of posting and publication. See TAX TITLES, 1, 2, 5.

NUISANCE. See NAVIGABLE RIVERS.

OCONTO, City of. Description of land in assessor's book. See TAX TITLES, 6, 7.

OFFICERS.

The overseer or superintendent of a poor-house and county asylum cannot recover the reward offered for the return of an insane person, who has escaped from another asylum and has been placed, by the authorities of a town into which he wandered, in the asylum of which such overseer has charge; and a promise to pay such reward to him, and a guaranty of such promise, are without consideration. *Ring v. Devlin*, 384
Constable. See COSTS, 5.
Court Commissioner. See VOLUNTARY ASSIGNMENT, 8.
District Attorney. See CRIMINAL LAW, 8-10.
Mayor. See MUNICIPAL CORPORATIONS, 1.
Sheriff. See CONVERSION, 1. GARNISHMENT, 3.
Town Supervisors. See HIGHWAYS, 3-7. TAXATION, 1.

OPENING case for new evidence. See EVIDENCE, 19.

OPINION of trial judge, when available on appeal. See APPEAL (B.), 6.

OPINIONS. See EVIDENCE, 6.

ORDER of proof. See EVIDENCE, 8.

OVERSEER of poor-house. See OFFICERS.

PARENT AND CHILD.

See DEBTOR AND CREDITOR, 4-6. EVIDENCE, 3. INSTRUCTIONS TO JURY, 3. MORTGAGES, 4. RAILROADS (C.), 4.

In the absence of any agreement by a father to pay for board, lodging, and washing while living with his son as a member of his family, the latter cannot recover payment therefor. *Leary v. Leary*, 662

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PARTIES.

See CHATTEL MORTGAGES, 2. DEED, 2. LOGS AND TIMBER, 1. RECEIVERS, 2. VOLUNTARY ASSIGNMENT, 1.

1. If one of the joint owners of chattels verbally tells the other owner that if he will bring an action for the conversion thereof he may have the benefit of it, that is a sufficient assignment of the cause of action to authorize the latter to sue alone. *Arpin v. Burch*, 619

2. A formal assignment of a note and mortgage, executed by the mortgagee in writing under seal, is ample proof of the assignee's legal title thereto, without proof of any consideration paid. *Leary v. Leary*, 662

3. After the plaintiff in an action of foreclosure has shown a legal title in himself to the mortgage in suit, the burden of showing that he is not the real party in interest is upon the defendant. *Ibid.*

PARTNERSHIP.

See CONTRACTS, 2. EVIDENCE, 13-15. GARNISHMENT, 2. RECEIVERS, 2, 3. VOLUNTARY ASSIGNMENT, 3, 6.

1. A firm engaged, among other things, in carrying on a mill in which it holds stock, is liable upon a note, given for a loan of money to keep such mill in operation, and signed in its name by one of the partners, though he had no special authority from his copartners. *Morse v. Hagenah*, 603

2. This is so, especially, where the firm has by its acts held out such partner to the public as clothed with authority to give notes generally in its name. *Ibid.*

PATENTS.

1. A state court has jurisdiction of an action to compel the performance of a contract to assign the right to a patent for an invention, when both the parties, at the time of the contract, were residents of the state. *Fuller & Johnson Mfg. Co. v. Bartlett*, 73

2. The superintendent of a manufacturing company, knowing its intention to perfect and put upon the market a new machine, voluntarily disclosed his conception of a device to be used in connection therewith, and, under the direction of the company and with its material and at its expense, voluntarily went to work to perfect such device and construct the machines and to aid in putting them upon the market. *Held*, that from such facts the law would not imply an agreement for the absolute assignment to the company of the patent for such device, but would imply an agreement for a license to the company to manufacture perpetually, at its then existing works, machines embodying such invention, and to sell them wherever it could find a market. *Ibid.*

3. Equity will compel specific performance of such implied contract for a license. *Ibid.*

PAUPERS.

A pauper about sixty years old, having a legal settlement in the town of G., was supported for ten years at the expense of that town in the poor-house of the town of S. Afterwards one D. was employed by the town of G. to support him for about six

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months at $1 per week, and thereafter for four years he lived with D. in the town of S. and worked for his board and clothes. D. then refused to support him, and he applied again to the town of G. for support, which was refused, and he was then supported by the town of S. *Held*, that he was a pauper all of the time mentioned, and therefore did not acquire a legal settlement in the town of S., and the town of G. remained liable for his support. *Saukville v. Grafton*, 192

PAYMENT.

See LIMITATION OF ACTIONS, 4, 5. MORTGAGES, 5. SALE OF CHATTELS, 6.

1. If, pending an appeal from a judgment, the appellant pays the amount thereof in settlement of a creditors' suit commenced to enforce the same, the payment is not voluntary, but if such judgment is afterward reversed, or the amount thereof reduced by the appellate court, he may, in an action for that purpose, recover back the amount paid, or the excess above the judgment in the latter court. *Chapman v. Sutton*, 657
2. Payment of a judgment is not a waiver of an appeal then pending, or of the right to appeal therefrom, or to bring a writ of error to review it. *Ibid.*

PENAL statutes must be strictly construed. See FENCES, 3.

PERSONAL PROPERTY. See ABATEMENT, 2. AGENCY. BILLS AND NOTES. CHATTEL MORTGAGES. CONTRACTS, 4, 5. CONVERSION. DEBTOR AND CREDITOR, 4. EVIDENCE, 6, 17. EXCISE LAWS. FRAUDULENT CONVEYANCES. INTEREST. LIENS. LIMITATION OF ACTIONS, 6. LOGS AND TIMBER. PARTIES, 1, 2. PARTNERSHIP. PATENTS. REPLEVIN. SALE OF CHATTELS. TAXATION, 2. VOLUNTARY ASSIGNMENT.

PETITION by intervener. See DEBTOR AND CREDITOR, 1, 2.

PLACE OF TRIAL. See CHANGE OF VENUE.

PLEA in abatement. See ABATEMENT. CRIMINAL LAW, 2.

PLEADING.

See ABATEMENT. ACCORD. ASSAULT AND BATTERY, 1, 2. BANKRUPTCY, 4. CONVERSION, 2. CRIMINAL LAW, 2, 3, 6, 7. DEBTOR AND CREDITOR, 1, 2. INSURANCE, 4. JOINDER (A.). JUDGMENT, 4. RAILROADS (C.), 2–4.

1. A complaint stating that plaintiff's intestate was a widow at the time of her death, and that three of her children, being of the ages of thirteen, eleven, and nine years respectively, were dependent upon her for their support, nurture, and education, is *held* to show sufficiently that such children suffered a pecuniary loss by her death. *McKeigue v. Janesville*, 59
2. An allegation of a refusal is equivalent to an allegation of a demand and refusal. *Divan v. Loomis*, 150
3. Where matter properly pleadable as a defense — but not pleadable as a counterclaim because not constituting a cause of action in favor of *both* defendants — has been pleaded as a counterclaim, and a verdict has been rendered thereon for damages in favor of the defendants, the error may be cured by the trial court striking

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out such damages from the verdict and rendering judgment merely dismissing the complaint with costs. *Washburn v. Dosch*, 436

4. A complaint which is not demurred to, except by objection to evidence at the trial, must be liberally construed. *Brickley v. Walker*, 563

5. A judgment will not be reversed for the refusal of the court to permit the plaintiff to recover on the original contract upon which the note in suit was founded, if he asked no amendment of the complaint to set it up. *Plano Mfg. Co. v. Frawley*, 577

6. Plaintiff's contributory negligence may be shown under a general denial. If specially pleaded the court may order that such plea be made definite and certain or be stricken out. And such order is not appealable. *McQuade v. C. & N. W. R. Co.*, 616

7. A complaint alleged that the defendant was indebted for property sold and delivered to him, but the evidence showed that he wrongfully converted the property. *Held*, that the variance was immaterial, as the plaintiff had the right to waive the tort and sue upon contract. *Walker v. Duncan*, 624

POOR-LAWS. See PAUPERS.

POSSESSION. See CONVERSION, 2. CRIMINAL LAW, 7. VENDOR AND PURCHASER, 1.

PRACTICE. See ATTACHMENT. ACCORD. APPEAL. APPEALABLE ORDER. ASSAULT AND BATTERY, 1, 2. BANKRUPTCY. CHANGE OF VENUE. CONVERSION, 2. COSTS. COURT AND JURY. CRIMINAL LAW. DAMAGES, 2. DEBTOR AND CREDITOR, 1, 2, 11. DIVORCE. ESTATES OF DECEDENTS. EVIDENCE. GARNISHMENT. HOMESTEAD, 1, 2. INSTRUCTIONS TO JURY. INTEREST. JOINDER. JUDGMENT. JURISDICTION. LANDLORD AND TENANT, 1, 2. LIENS. LIMITATION OF ACTIONS. LOGS AND TIMBER. MORTGAGES, 6, 7. MUNICIPAL CORPORATIONS, 1, 4. NEW TRIAL. PARTIES. PAYMENT. PLEADING. RAILROADS (A.), 3; (C.), 3. RECEIVERS. REPLEVIN. ROCK COUNTY MUNICIPAL COURT. SURETYSHIP. VERDICT. VOLUNTARY ASSIGNMENT. WILLS, 2, 3.

PREFERENCES. See VOLUNTARY ASSIGNMENT, 2, 4, 5.

PRESUMPTIONS. See COSTS, 5. CRIMINAL LAW, 8. RAILROADS (C.), 1. WILLS, 3.

PRINCIPAL AND AGENT. See AGENCY. CONTRACTS, 4. EXCISE LAWS, 2. MARRIED WOMEN, 2. RAILROADS (B.). VENDOR AND PURCHASER, 4. VERDICT, 1.

PRINCIPAL AND SURETY. See SURETYSHIP.

PRIVILEGED COMMUNICATIONS. See EVIDENCE, 14, 15.

PROBATE OF WILL. See WILLS.

PROCESS. See COSTS, 5. GARNISHMENT. JURISDICTION. REPLEVIN.

PROMISSORY NOTES. See BILLS AND NOTES. PARTNERSHIP. PLEADING, 5. SURETYSHIP.

PROOF of publication and posting of notice of tax sale. See TAX TITLES, 1, 2, 5.

PUBLIC LANDS. See LOGS AND TIMBER, 1.

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RAILROADS.

(A.) *Condemnation of land.*

1. Where a portion of a farm has been taken for a railroad, the damage to the other portion by reason of such taking is the depreciation in its market value, and in determining this the jury may consider the smoke, noise, danger and inconvenience of working the farm in consequence of the road running through it. But these things do not of themselves constitute a basis for separate and distinct damages. *Weyer v. C., W. & N. R. Co.* 180
2. In estimating the value of land taken for a railroad, the jury may take into consideration its productiveness, or the income which might have been derived from it if it had not been taken. *Ibid.*
3. The jury were instructed that, in determining the value of land taken and the damage by reason of such taking, they could not give less than $375 nor more than $1,750, if these were the highest and lowest estimates of the witnesses. As a matter of fact the estimate of one witness was $350. The jury found a verdict for $1,012.50. *Held*, that the railroad company could not have been prejudiced by the instruction. *Ibid.*

(B.) *Master and Servant.*
See VERDICT, 1.

1. A ticket agent left another employee in charge of the ticket office, who failed to return the proper change upon the sale of a ticket and, upon being asked therefor by the purchaser, assaulted and struck the latter. *Held*, that the railroad company was liable for such acts of its employee. *Fick v. C. & N. W. R. Co.* 469
2. The negligence of a section boss in failing to keep the track clear of obstructions at a point where a brakeman was obliged to run along the same for the purpose of coupling cars, thus rendering the performance of that duty unnecessarily dangerous, is the negligence of the company and it is liable for an injury to the brakeman caused thereby. *Hulehan v. G. B., W. & St. P. R. Co.* 520
3. The burden is upon the railroad company to show that the brakeman assumed the risks growing out of such obstructions by remaining in its employ after knowledge thereof. *Ibid.*
4. The fact that the brakeman had general knowledge of the neglect of the company to keep its track clear about its wood-yards, does not conclusively show that he assumed all the risks arising therefrom, especially if he did not know of the obstructions on the track at the place where he was injured; and it is a question for the jury in such a case whether he was guilty of negligence in remaining in the employ of the company. *Ibid.*

(C.) *Negligence.*

1. The evidence in this case — showing that the plaintiff, while standing on a side track of the defendant's railway in front of a car loaded with lumber belonging to him, which had been left there to be unloaded, was run over and killed by such car, which was struck and set in motion by other cars which had been standing on the same track, but not showing what force set the other cars in motion, what the grade of the side track was, the customary manner in which such track had theretofore been used, or that any employee of the defendant was about such side track when the accident happened or before — is *held* not to raise a sufficient presumption of negligence on the part of the defendant to require the submission of that question to the jury. *Miller v. C., M. & St. P. R. Co.* 184

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2. In an action for negligence in constructing a railway across a highway, an allegation that the railway company "tore up, changed, destroyed, and excavated said highway," does not show that the *locus in quo* was no longer a public highway, but amounts only to an allegation that the use of said highway by the public was interrupted or destroyed. *Washburn v. C. & N. W. R. Co.* 474

3. Where the only averment directly affecting the question of negligence is that a person did an act negligently, or the opposite, such averment is one of fact. *Ibid.*

4. A complaint showing that the plaintiff, a boy five years old, was injured by falling into a dangerous excavation where a railroad crossed a highway, and alleging that neither he nor either of his parents was guilty of any negligence, but not showing whether the plaintiff was attended by any person at the time of the injury, or the circumstances under which he fell into the excavation, is *held* not to show that the plaintiff or either of his parents was guilty of negligence, but the reverse. *Ibid.*

RATIFICATION. See DEBTOR AND CREDITOR, 9.

REAL PROPERTY. See ADVERSE POSSESSION. CONTRACTS, 1–3. CORPORATIONS. DAMAGES, 3, 4. DEBTOR AND CREDITOR, 3, 9–11. DEED. FENCES. HIGHWAYS, 2–4. HOMESTEAD. INSURANCE, 3–5. LANDLORD AND TENANT. LOGS AND TIMBER. MARRIED WOMEN, 2. MORTGAGES. NEGLIGENCE, 2. RAILROADS (A.). TAX TITLES. VENDOR AND PURCHASER.

RECEIPT. See ACCORD. EVIDENCE, 18.

RECEIVERS.

1. It rests in the discretion of the court to allow a party to bring an independent action against a receiver, or to compel him to proceed by petition in the action in which the receiver was appointed. If the relief sought can be obtained by such petition it is no abuse of discretion to refuse to grant leave to bring an action. *Mechanics' Nat. Bank v. Landauer*, 44

2. A receiver appointed in an action for the dissolution of a partnership is not a necessary party to a suit by certain creditors to set aside alleged fraudulent transfers of the firm property, made before his appointment, or to establish the prior right of such creditors to the assets in his hands. *Ibid.*

3. If such receiver has suffered the good-will of the firm to be lost he may be held to account for its value by a proceeding in the action for dissolution. *Ibid.*

4. A proceeding for the removal or suspension of a receiver must be taken in the case in which he is receiver. *Ibid.*

REDEMPTION. See TAX TITLES, 8.

REFERENCE. See CHANGE OF VENUE. EVIDENCE, 9. NEW TRIAL, 1.

REPLEVIN.

See VOLUNTARY ASSIGNMENT, 1.

1. Defendant in replevin had judgment for a return of the property taken on the writ or, if a return could not be had, for its value. The officer to whom execution was issued made return thereof to the effect that a return of the property could not be had and that

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the execution was unsatisfied. Assuming that upon a proper showing the trial court might direct such return to be corrected or amended (a point not determined), it is *held* upon the evidence that such return was true and that no amendment should be made. *Irvin v. Smith,* 220

2. Upon the evidence in this case it is *held* that ties, posts, and telegraph poles tendered to the defendant by the plaintiffs were not the identical property taken from him under a writ of replevin, and that he was therefore not bound to accept them in satisfaction of a judgment in his favor for the return of such property. *Irvin v. Smith,* 227

RES ADJUDICATA. See BANKRUPTCY, 1. CRIMINAL LAW, 1, 2. JUDGMENT, 6.

RESCISSION. See ACCORD AND SATISFACTION.

RES GESTÆ. See EVIDENCE, 2.

RESTRAINT OF TRADE. See CONTRACTS, 5.

RETURN OF PROCESS. See COSTS, 5. GARNISHMENT, 8. REPLEVIN.

REVERSAL OF JUDGMENT. See JUDGMENT, *Appeal.*

REWARDS. See OFFICERS.

RIVERS. See NAVIGABLE RIVERS.

ROCK COUNTY MUNICIPAL COURT.

1. Ch. 197, Laws of 1881, gives to the municipal court of Rock county exclusive jurisdiction of all appeals from the judgments of justices in said county, in both civil and criminal cases; and such act is not unconstitutional. *Taylor v. De Camp,* 162

2. An action for forcible entry or unlawful detainer is a civil case, within the meaning of said act. *Ibid.*

RULES OF COURT.
Circuit Court Rule XI, secs. 1, 6 (motions and orders), 410.

SALE OF CHATTELS.

See AGENCY, 2. CONTRACTS, 4. EXCISE LAWS. FRAUDULENT CONVEYANCES. LIENS, 1.

1. The contract between the parties herein, made by numerous letters, is *held* to have been that shingles shipped by the defendant to the plaintiffs were not sold to the latter for what they could "afford to pay," but were *to be sold by them* and the net proceeds of the sales applied in payment for flour sent by them to the defendant. *Gaveney v. Gates,* 1

2. Where a contract for the sale of logs provides that the purchaser shall pay at one rate for good, sound, merchantable logs, and at another rate for inferior logs, a mere acceptance of the logs is not an acceptance of the entire lot as being good, sound, and merchantable, even though they are so marked by a scaler who was employed solely for the purpose of ascertaining the quantity, not the quality, of the logs. *Early v. Chippewa Logging Co.* 112

3. Where the logs sold are scaled by a person mutually agreed upon, his estimate of the quantity and of the deductions to be made for defects is binding upon the parties unless impeached for fraud, mistake, prejudice, or neglect. *Ibid.*

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4. Although a bill of sale does not contain a warranty, it may be shown by parol that there was an oral warranty of quantity; and a written guaranty of quantity executed a day or two later than the bill of sale, in pursuance of an oral agreement made at the time of the sale, is based upon a sufficient consideration and is a binding part of the contract. *Collette v. Weed*, 428

5. In an action for the price of a reaping machine, wherein the defendant has set up its defects as a counterclaim, an instruction to the effect that the purchaser of such a machine with a warranty might recover special damages arising directly out of peculiar and exceptional circumstances affecting the agreement, such as for loss of or damage to crops and loss of time in attempting to use the machine, by reason of its not being put in condition as agreed or not being as warranted, followed by cautions as to allowing such damages, and leaving the question of their allowance to the jury, *held* not to be misleading. *C. Aultman & Co. v. Case*, 612

6. To take an executory parol contract for the sale of chattels for a price exceeding $50 out of the statute of frauds (sec. 2308, R. S.), where, at the time of the sale, there was no delivery or acceptance or part payment, a subsequent delivery and acceptance must be shown. A subsequent part payment is not sufficient. *Kerkhof v. Atlas Paper Co.* 674

7. Ch. 81, Laws of 1883, relating to the sale of personal property, applies only to written contracts, and does not repeal the statute of frauds (sec. 2308, R. S.). *Ibid.*

SALE OF LANDS. See ADVERSE POSSESSION. CONTRACTS, 1–3. CORPORATIONS. DAMAGES, 3, 4. DEBTOR AND CREDITOR, 3, 9–11. DEED. HOMESTEAD. MORTGAGES, 1–3. TAX TITLES. VENDOR AND PURCHASER.

SANITY. See WILLS.

SATISFACTION of mortgage. See MORTGAGES, 4.

SCHOOL LANDS. See LOGS AND TIMBER, 1.

SERVICE.
Of notice of meeting of fence viewers. See FENCES, 1.
Of garnishee summons on principal defendant. See GARNISHMENT.
Of process in another country. See JURISDICTION.
Of notice of application for tax deed. See LANDLORD AND TENANT, 1.

SETTLEMENT. See ACCORD. EVIDENCE, 18. PAUPERS.

SHERIFF. See CONVERSION, 1. GARNISHMENT, 3.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 4.

SPECIAL VERDICT. See VERDICT.

SPECIFIC PERFORMANCE. See VENDOR AND PURCHASER, 6.

STATUTE OF FRAUDS. See CONTRACTS, 3, 6, 7. SALE OF CHATTELS, 6, 7. VENDOR AND PURCHASER, 3, 6–8.

STATUTE OF LIMITATIONS. See ADVERSE POSSESSION. LIMITATION OF ACTIONS. TAX TITLES, 3, 4.

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STATUTES.
Constitutionality. See ROCK COUNTY MUNICIPAL COURT. TAX TITLES, 7.
Construction. See APPEAL (B.), 2; (C.). BANKRUPTCY, 4. CENSUS. CONTRACTS, 2, 6, 7. CORPORATIONS. COSTS, 4. CRIMINAL LAW, 3, 5, 6. DIVORCE. EXCISE LAWS. FENCES. GARNISHMENT. HIGHWAYS. INSURANCE, 3. JOINDER. JUDGMENT, 3, 7. LIENS. LIMITATION OF ACTIONS, 2–5. LOGS AND TIMBER. ROCK COUNTY MUNICIPAL COURT. SALE OF CHATTELS, 6, 7. TAXATION, 1. TAX TITLES. VENDOR AND PURCHASER, 6, 8. VOLUNTARY ASSIGNMENT, 2, 7, 8. WILLS, 2, 3.
Repeal. See CENSUS. CRIMINAL LAW, 5. SALE OF CHATTELS, 7. VOLUNTARY ASSIGNMENT, 2.

STATUTES CITED, ETC.

CONSTITUTION OF WISCONSIN.

Art. IV, secs. 31, 32 - 203, 212

SESSION LAWS.

1872. Ch. 155 - - 571, 572
1874. " 179, sec. 5 - - 544
1874. " 347 - - - 516
1876. " 313, tit. IV, sec. 3, subd. 32 - - 244
1876. " 318, tit. V, secs. 1–24 - - - 244
1880. " 180, tit. VI, secs. 1, 5 244
1880. " 180, tit. VI, secs. 6–8 245
1880. " 305 - - - 14, 16
1880. " 309 - - - 14, 15
1880. " 309, sec. 3 13, 14, 133, 134
1881. " 52 - - - 412, 415
1881. " 105 - 202–3, 205–7, 212
1881. " 197 - - - - 162
1881. " 197, sec. 1, - - 163
1881. " 268 - - - - 207
1882. " 202 - - - - 247
1882. " 239 359, 362–3, 481–2, 487
1882. " 319 - 98, 101, 104, 107
1882. " 319, secs. 1, 2 - - 101
1883. " 41 - - - - 576
1883. " 49 - - - - 67
1883. " 81 - - - 674, 677
1883. " 163 - - - 546, 552
1883. " 261 - - - - 495
1883. " 349 - - - 442, 444
1885. " 48 - - - 442, 444
1885. " 58 - - 135, 144, 145
1885. " 161 - - 135, 143, 144
1885. " 161, sec. 5 - - 144
1885. " 161 " 11 - 135, 142–4
1885. " 296 - - - - 145
1885. " 296, sec. 1 135, 140, 142
1885. " 296 " 3 - - 141
1885. " 296 " 4 538, 540, 544

REVISED STATUTES OF 1849.

Ch. 86, secs. 23, 24 - - 164
" 120, sec. 4 - - - 91

REVISED STATUTES OF 1858.

Ch. 35, sec. 5 - - - 544
" 153, " 12 - - 93, 107

REVISED STATUTES OF 1878.

Section 220 - - - - 361
" 222 - - - 361, 362
Sections 224, 226, 241 - - 361
Section 653 - - - - 633
" 776, subd. 5 - - 504
" 776, " 9 - 552, 554
Sections 821, 822, 824 - - 504
Section 997 - - - - 144
" 1047 - - - - 207
" 1108 - - - - 609
" 1130 - 12–14, 133, 134
Sections 1132, 1141 - - - 15
Section 1165 - - - - 633
" 1175 - - - - 30
" 1223 - - - - 58
" 1237 - - - 502, 503
" 1239 - - - - 552
" 1240 - - 546, 552, 553
" 1269 - - - 158, 161
" 1275 - - 158, 160, 161
" 1276 - - - - 160
" 1339 - - - 50, 53–55
" 1393 - - 491, 493, 495
" 1393, subd. 3 - 493, 494
" 1397 - - 491, 493, 495–6
" 1550 - - - - 544
" 1694 - - 497, 499, 500
Sections 1695, 1696 - 497, 499–501
Section 1848 - - - - 182
" 1943 - - - 510, 515
" 2216 - - - 651, 655

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STATUTES CITED, ETC.—con.

REVISED STATUTES OF 1878—con.

Section 2302 - - - 344, 350
" 2304 - - - 364, 368
" 2307 - - - 344, 350
" 2307, subd. 1 - - 441
" 2308 - - - 674, 676
Sections 2343, 2345 - - 571, 572
Section 2364 - - - 305, 306
" 2369 - - 305, 306, 308
" 2405 - - - - 72
" 2597 - - - - 164
" 2610 - - - - 576
Sections 2636, 2637 - - 285
Section 2647, subd. 2 - 231, 232
" 2655, " 2 - - 489
" 2656 - - - - 438
" 2667 - - - 127, 439
Sections 2669, 2670 - - 439
" 2752–2772 (Ch. 125) - 214
Section 2754 - - - - 288
" 2756 - - 278, 285–7, 289
" 2758 - - - - 290
" 2765 - - - - 286
" 2829 - - - 69, 439
" 2831 - - - - 72
" 2832 - - - 62, 70
Sections 2870, 2875 - - - 194
Section 2884, subd. 1 - - 293
" 2886 - - - - 69
" 2891, subd. 1 - 61, 68
" 2918, " 6 - 412, 415
" 2921 - - - 384, 415
" 2925 - - - - 179
" 2928 - - - - 673
" 2959 - - - - 673
" 2983 - - - - 131
Sections 3021–3024 - - - 398
Section 3029 - - - - 343
" 3049 - - - 220, 222
" 3052 - - - - 67

REVISED STATUTES OF 1878—con.

Section 3060 - - - - 67
" 3069 - - - - 619
" 3087 - - - - 16
" 3156 - . - - 670
Sections 3314–3347 (Ch. 143) 212, 214
Section 3329 - - 90, 93, 98, 101
" 3330 - - - - 90
" 3331 - - 90, 91, 101
" 3332 - - - - 101
" 3341 - - - - 95
Sections 3362, 3368 - - - 164
" 3594, 3595 - - - 494
Section 3608 - - - 494, 495
Sections 3767, 3769 - - - 178
Section 3780 - - - - 673
" 3788 - - - 373, 379
" 4055 - - - - 678
" 4069 - - - 148, 378
" 4204 - - - - 395
" 4205 - - - - 396
Sections 4206–4252 (Ch. 177) - 23
Section 4213 - - - - 318
" 4222 - - - - 22
" 4230 - - - - 23
" 4234 - - - 16, 22
Sections 4243, 4244 - - - 559
" 4247, 4248 - - - 559
Section 4251 - - - - 22
" 4255 - - - 50, 53–55
" 4269 - 358–9, 362, 481–2, 488–9, 623
" 4387 - - - - 389
" 4410 - - 416, 419, 422–3
" 4411 - - - 416, 422
" 4621 - - - - 424

TAYLOR'S STATUTES.

Ch. 17, secs. 3, 4 - - - 496

STAY OF PROCEEDINGS. See BANKRUPTCY, 4. JUDGMENT, 1, 2.

STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 2, 3. NEGLIGENCE, 1.

SUBROGATION, See SURETYSHIP.

SURETYSHIP.

See OFFICERS.

1. One surety who has paid a judgment rendered against the principal debtor and all the sureties, may, for the purpose of enforcing repayment from the principal or contribution from his co-sureties, be subrogated to all the rights of the judgment creditor, especially if he has taken an assignment of the judgment. *German-American Savings Bank v. Fritz,* 390

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2. To secure the benefit of the lien of such judgment as against a co-surety, the surety paying should ordinarily resort to an equitable proceeding; but when such co-surety has made a motion, based on such payment, that the judgment be canceled and declared satisfied as to all the defendants, the court may order the judgment to stand as against him to the extent of his liability to contribute, and may award execution thereon against him for that amount. *Ibid.*

TAXATION.

See HIGHWAYS, 5-7. TAX TITLES.

1. The time for the collection of the taxes set down in a town tax roll may be extended by an indorsement, in proper form, upon the roll, signed officially by the town supervisors, each acting separately. The statute does not contemplate a meeting and formal action by the board, evidenced by their record kept by the clerk. *New Richmond Lumber Co. v. Rogers,* 608

2. It is a sufficient levy of a tax warrant upon ponderous property, such as a quantity of oak plank, if the officer goes where it is and takes such control of it as is practicable without removing it, notifies the only person then upon or living near the premises where it is piled that he has levied upon it, requesting him to notify others that he had done so and that it must not be disturbed, and then posts up notices of levy and sale in proper public places. *Ibid.*

TAXATION of costs. See COSTS, 2, 3, 5, 6.

TAX TITLES.

See DEED, 1. LANDLORD AND TENANT, 1. MORTGAGES, 1.

1. An affidavit of the publisher of a newspaper, made May 7, 1880, that the notice of a tax sale "was published in said newspaper for the period of five weeks, commencing on the 9th day of April, 1880," does not show that it was published *once in each week for four successive weeks,* as required by sec. 1130, R. S. *Ramsay v. Hommel,* 12

2. An affidavit of the posting of the notice of a tax sale in four specified places, "the same being four public places in the village of Neillsville," etc., does not show that it was posted in four public places in the *county,* within the meaning of sec. 1130, R. S. *Ibid.*

3. The limitation of sec. 3, ch. 309, Laws of 1880, is available only as to errors or defects going to the validity of the assessment and affecting the groundwork of the tax. *Ibid.*

4. The limitation of one year prescribed in sec. 3, ch. 309, Laws of 1880, does not cure defects in the notice of a tax sale or in the proof of publication thereof, but only defects "going to the validity of the assessment and affecting the groundwork of the tax." *Morris v. Carmichael,* 133

5. Proof that the notice of a sale was published "*for five weeks successively,* commencing on the 9th day of April, and ending on the 7th day of May, 1879," does not show a publication "*once in each week* for four successive weeks" prior to the sale on May 13, as required by sec. 1130, R. S. *Ibid.*

6. Ch. 105, Laws of 1881, provides that each parcel of land in the city of Oconto subject to taxation shall be fully described in numerical

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order in a book called the assessor's book, and shall also be known and designated in such book by numbers, thus: Part ——, of lot ——, of section ——, etc.; that such book shall be *written up annually* by adding thereto or *changing* all descriptions of parcels of land which have, by subdivision or otherwise, become liable to taxation since the book was last written up; that a map corresponding to such book shall be kept as a public record in the office of register of deeds, and shall also be written up and corrected annually; that in all the assessment and tax rolls, and in all advertisements, certificates, papers, conveyances, or proceedings for the assessment and collection of taxes, and proceedings founded thereon, any description by number shall be held to include the description written at length in the assessor's book, and any conveyance describing real estate by such number shall be legal and binding in all respects as if described by metes and bounds. Notwithstanding such act it is *held* that a description in tax certificates of land in the city of Oconto, as "Part 5 of lot 4 of section 20, town 28 north, of range 22 east," without referring to said act or to any book or map made in pursuance thereof, or to any other record, plat, or description, is so indefinite and uncertain as to be fatally defective. *Murphy v. Hall*, 202

[7. Whether said ch. 105, Laws of 1881, is void as contravening secs. 31, 32, art. IV, of the constitution, not determined.] *Ibid.*

8. A tax deed having but one witness, though recorded, will not give the grantee constructive possession, nor will the right of redemption be barred thereby. *Semple v. Whorton*, 626

TERMS. See EVIDENCE, 19. JUDGMENT, 7.

TESTAMENTARY CAPACITY. See WILLS.

TIME, Computation of. See TAX TITLES, 1, 5.

TORTS. See ASSAULT AND BATTERY. CHATTEL MORTGAGES, 2, CONVERSION. DAMAGES, 1, 5. DEBTOR AND CREDITOR, 4. EVIDENCE, 2–4, 17. HIGHWAYS, 1. INTEREST, 2. LIMITATION OF ACTIONS, 6. LOGS AND TIMBER. MUNICIPAL CORPORATIONS, 3, 4. NAVIGABLE RIVERS. NEGLIGENCE. RAILROADS, (B.), (C.). REPLEVIN.

TOWN SUPERVISORS. See HIGHWAYS, 3–7. TAXATION, 1.

TOWNS. See CENSUS. EXCISE LAWS. HIGHWAYS. PAUPERS.

TRANSACTIONS with persons since deceased. See EVIDENCE, 5. WILLS, 2.

TRAVERSE of affidavit for attachment. See HOMESTEAD, 1.

TRESPASS. See LOGS AND TIMBER.

TRIAL, Place of. See CHANGE OF VENUE.

UNCERTAINTY. See CHATTEL MORTGAGES, 1. TAX TITLES, 6.

USAGE. See AGENCY, 2. CONTRACTS, 4.

VARIANCE. See PLEADING, 7.

VENDOR AND PURCHASER OF LAND.

See ADVERSE POSSESSION. CONTRACTS, 1–3. CORPORATIONS. DAMAGES, 3, 4. DEBTOR AND CREDITOR, 3, 9–11. DEED. MORTGAGES, 1–3.

1. Actual possession of land is notice to a purchaser of the rights of the occupant, unless the purchaser derives his title from or through such occupant. *Lamoreux v. Huntley*, 24

2. A consideration in addition to that expressed in a deed may be shown by parol. *Kickland v. Menasha W. W. Co.* 34

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3. An oral agreement to pay a consideration in addition to that expressed in a deed is valid. *Ibid.*

4. An agent, having authority to purchase certain land for a corporation, paid a certain sum therefor, and agreed to pay a further sum at a future time. The deed to the corporation expressed only the consideration already paid. The corporation took possession of the land and afterwards sold it. *Held*, that the corporation was bound by the agreement to pay the additional consideration. *Ibid.*

5. The purchaser of land agreed that if he should sell it at an advanced price he would pay one half of the profits of such sale to his grantor. He afterwards sold the land, together with another tract bought from other parties on similar terms, for a gross sum. *Held*, that the amount to be paid to his grantor should be determined by an *apportionment* of the sum received according to the respective values of the tracts sold. *Ibid.*

6. Under sec. 2304, R. S., an oral agreement for the sale of lands is *void*, not voidable merely, and specific performance will not be enforced on the ground of a part performance unless otherwise the defendant would be enabled to practice a fraud upon the plaintiff. *Popp v. Swanke*, 364

7. Parol evidence of an agreement for the sale of land was admitted upon the trial without objection, but the court was requested to find as a fact that the contract was oral, and as a conclusion of law that it was void. *Held*, that this was sufficient to raise the question of the validity of the contract. *Ibid.*

8. S., having agreed orally to convey certain land and certain personal property to P. in payment for certain lumber to be delivered to him by P., executed a deed of the land to P. and delivered it to a third person in escrow, and also executed a written instrument by which he transferred "all the farming utensils belonging to me on the farm described as follows [describing the land]; the said farm being this day conveyed by me to said P.; also one hundred bushels of oats, fifty bushels of wheat, and six tons of hay out of the crops now growing and being on said premises." *Held*, that the contract was within the statute (sec. 2304, R. S.) and void. *Ibid.*

VENUE. See CHANGE OF VENUE.

VERDICT.

See APPEAL (B.), 7, 10, 16.

1. Where the facts found by a special verdict conclusively showed that wrongful acts of an employee were done in the course of his employment, a further finding that such acts were not done in the course of his employment is treated as a mere erroneous conclusion of law. *Fick v. C. & N. W. R. Co.* 469

2. A special verdict should cover all material controverted questions. *Kerkhof v. Atlas Paper Co.* 674

VIEW. See CRIMINAL LAW, 11-13.

VILLAGES. See CENSUS. EXCISE LAWS.

VOLUNTARY ASSIGNMENT.

See CHATTEL MORTGAGES.

1. An assignee for the benefit of creditors cannot maintain replevin for property on the ground that it was fraudulently transferred by

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his assignor prior to the execution of the assignment: following *Kloeckner v. Bergstrom*, 67 Wis. 197, and *Chas. Baumbach Co. v. Miller*, id. 449. *Frost v. Citizens' Nat. Bank*, 234

2. Ch. 48, Laws of 1885, which directs an assignee to pay first the claims of servants, etc., for personal service performed within three months prior to the assignment, does not repeal by implication ch. 349, Laws of 1883, which authorizes preferences in the assignment for wages earned within six months prior thereto. *First Nat. Bank v. Baker*, 442

3. An assignment by partners purported to convey to the assignee all the partnership property "not exempt to them by the laws of the state," and a schedule contained a claim by each partner of certain property as being exempt. All of the property, however, was delivered to the assignee and remained in his possession, and the assignors never in fact claimed any property as exempt. *Held*, that the exemption clause did not invalidate the assignment. *Ibid.*

4. The fact that after the execution of an assignment the assignor, in pursuance of a prior contract, gave to one of his creditors an order upon one of his debtors, which was paid, did not invalidate the assignment. *Ibid.*

5. The fact that, before the assignee knew that an assignment was contemplated, the assignor turned over to him notes of the value of $215, in discharge of a debt of $90 due him, and upon his agreement to pay $100 to an employee of the assignor, there being nothing to show that the transaction was not in good faith, is *held* not to invalidate the assignment subsequently made. *Ibid.*

6. One partner had never resided in this state. The other partner had resided in Crawford county (where the firm had its only place of business) for six or seven years prior to the assignment. Some months prior to the assignment the wife of the latter partner left the state because of sickness, and her husband thereupon broke up housekeeping and sold some of his furniture, but remained in Crawford county attending to the business until about the time of the assignment. *Held*, that the assignment was properly made in Crawford county. *Ibid.*

7. Until the bond of the assignee, with an indorsement thereon by the county judge or court commissioner taking the same, showing that he is satisfied as to the sufficiency of the sureties, has been filed in the office of the clerk of the circuit court, together with a true copy of the assignment with the indorsement by the assignee and certificate by the judge or court commissioner as required by sec. 1696, R. S., the assignee has no right to the property attempted to be assigned as against attaching creditors. *Fuhrman v. Jones*, 497

8. Whether the attorney for the assignor or assignee is competent to act as a court commissioner in making the indorsements and certificate required by secs. 1694–96, R. S., not determined. *Ibid.*

VOLUNTARY PAYMENT. See LIMITATION OF ACTIONS, 4, 5. PAYMENT, 1.

WAIVER.
Of plea in abatement. See ABATEMENT.
Of right to change of venue. See CHANGE OF VENUE.
Of right to be present at view. See CRIMINAL LAW, 12.
Of right to intervene. See DEBTOR AND CREDITOR, 2.
Of exemption. See HOMESTEAD, 1.
Of forfeiture. See INSURANCE, 1.
Of defects in proofs of loss. See INSURANCE, 7.

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Of right to appeal from judgment. See PAYMENT, 2.
Of tort. See PLEADING, 7.

WARRANTY. See AGENCY, 2. DAMAGES, 3, 4. SALE OF CHATTELS, 4, 5.

WATERCOURSES. See NAVIGABLE RIVERS.

WITNESSES. See COSTS, 5, 6. WILLS, 2.

WILLS.

1. The evidence in this case—showing, among other things, that the testator had for several years been suffering from softening of the brain, which finally culminated in his death at the age of seventy-five shortly after the execution of the will; that at times he had suffered from severe nervous prostration, and that during such times his intellect was very feeble and his power of memory largely gone, but that in the intervals between such attacks his mind was reasonably clear; that in one of such intervals he gave directions for drawing the will and executed the same; and that the elements entering into the will were few and simple, and the will itself a reasonable one—is *held* to sustain the finding of the county and circuit courts that the testator had sufficient testamentary capacity to execute the will. *Will of Silverthorn*, 372
2. Whether a devisee or legatee named in a will is competent to testify in support of the will to conversations and transactions with the testator in his life time, not determined. *Ibid.*
3. LYON, J., is of the opinion that the statute (sec. 3788, R. S.) requires affirmative proof of the testator's sanity before a will can be admitted to probate; but that when a *prima facie* case has been made, the presumption *of sanity* arises, and the burden of proof is thereafter upon the contestant. *Ibid.*

WORDS AND PHRASES.
"*Affirm*," in statute. See APPEAL (C.).
"*Alimony*." See DIVORCE.
"*Apply* for appointment of appraisers." See HIGHWAYS, 4.
"*Breaking*." See CRIMINAL LAW, 4, 5.
"*Civil cases*," in statute. See ROCK COUNTY MUNICIPAL COURT, 2.
"*Contract*," in statute. See JOINDER.
"*Conversion*." See CONVERSION, 1.
"*Debt of another*," in statute. See CONTRACTS, 7.
"*Destroyed* the highway," in pleading. See RAILROADS (C.), 2.
"*Due diligence*," in statute. See GARNISHMENT, 3.
"*Expense*" of rebuilding fence, in statute. See FENCES, 2.
"*Good faith*." See LOGS AND TIMBER.
"*Improperly or insufficiently taken*," in statute. See CENSUS.
"*Interest in lands*," in statute. See CONTRACTS, 3.
"*Jeopardy*." See CRIMINAL LAW, 1.
"*Magistrate*," in policy. See INSURANCE, 6.
"*Mistake*." See LOGS AND TIMBER, 1, 2.
"*Once in each week for four successive weeks*," in statute. See TAX TITLES, 1, 5.
"*Pauper*." See PAUPERS.
"*Public places in the county*." See TAX TITLES, 2.
"*Railroad freight car*," in statute. See CRIMINAL LAW, 6.
"*Refused*," in pleading. See PLEADING, 2.
"*Within one year*," in statute. See CONTRACTS, 3, 6.

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